APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of California

Petition for Certiorari Filed May 26, 1973
Certiorari Granted October 9, 1973

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1. 5-31-72—Petition for Writ of Mandate and Memorandum of Points and Authorities in Support of Petition for Writ of Mandate.
2. 6-19-72—Lodged exhibits Brown.
3. 7-31-72—Memorandum of Points and Authorities in Response to Petition for Writ of Mandate submitted by respondent Secretary of State.
4. 9-07-72—The Alternative Writ of Mandamus was ordered issued.
5. 9-12-72—Alternative Writ of Mandamus was issued.
6. 9-15-72—Filed letter from County Clerk, San Luis Obispo County, of intended compliance with Alternative Writ.
7. 9-15-72—Motion for Order Granting Leave to Intervene in Pending Action.
8. 10-02-72—Supplementary Points and Authorities in Support of Motion for Order Granting Leave to Intervene in Pending Action.
9. 10-02-72—Return to Alternate Writ of Mandamus by Respondent Edmund G. Brown, Jr., Secretary of State.

10. 10-11-72—Application of American Civil Liberties Union of Southern California for Leave to File Brief as Amicus Curiae on Behalf of Petitioners; brief of amicus curiae filed.

11. 10-13-72—Return to Alternative Writ of Mandamus by respondent Ernest Maggini, County Clerk of the County of Monterey.

12. 10-25-72—Brief of Interveners Viola N. Richardson and Duncan M. James in Response to the Brief of the American Civil Liberties Union as Amicus Curiae.

13. 10-25-72—The Motion to Intervene denied; joined as party respondent on court's own motion. Motion to Intervene and Points and Authorities may serve as return to the Alternate Writ.

14. 11-06-72—Ordered on bank calendar, San Francisco: 12-6-72.

15. 12-06-72—Filed letter from District Attorney of Mendocino County regarding Proposition 7.

16. 12-06-72—Matter (mandamus) called and continued.

17. 12-08-72—Filed letter from California Rural Legal Assistance regarding Proposition 7.

18. 12-15-72—Supplemental Points and Authorities of Respondent Edmund G. Brown, Jr., Secretary of State.

19. 1-11-73—Ordered on bank calendar, San Francisco: 2-5-73.

20. 2-05-73—Matter (mandamus) called and argued.

21. 3-30-73—Decision filed.

22. 10-15-73—Filed order from U. S. Supreme Court granting cert.

In the Supreme Court of the State of California

S.F. No.

Abran Ramirez, Larry Gill and Albert Lee, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Petitioners,

vs.

Edmund G. Brown, Jr., Secretary of State of the State of California; Ernest Maggini, County Clerk for the County of Monterey County; Mervin Mattos, Registrar of Voters of Stanislaus County; Ruth Warnken, County Clerk of San Luis Obispo County, individually and as representatives of the class of all other County Clerks and Registrars of Voters,

Respondents.

PETITION FOR WRIT OF MANDATE

To the Honorable Donald R. Wright, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Petitioners Abran Ramirez, Larry Gill, Albert Lee, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California respectfully petition this Court for a Writ of Mandate and in support of their petition allege as follows:

INTRODUCTION

I.

On May 24, 1966, this Court in *Otsuka v. Hite,* 64 Cal.2d 596, construed the phrase "infamous crime" of Section 1 of Article II of the California Constitution to include only those crimes which threaten the purity of the ballot box. In the six years since that decision the registrars of voters in the fifty-eight (58) counties have determined on an ad hoc basis who in their individual opinion will be denied the right to vote. A survey conducted by the California Secretary of State two months ago showed such disparity of practice by county registrars that practically no two counties are alike. For example in Alameda every ex-felon is registered except those convicted of Election Code violations whereas in other counties examples of disqualifying crimes include non-support in San Diego County, desertion in Santa Cruz County, prostitution in San Bernardino County, possession of marijuana in San Joaquin County, statutory rape (but apparently not forcible rape) in Los Angeles County, and drunk driving in Butte County.

In addition during the six years since *Otsuka* was decided the Courts have taken a new look at restrictions imposed on the election process and have placed an even greater burden on states to justify any limitations. Long-established and traditional conditions previously considered valid have been struck down or abandoned. These include residency requirements, literacy tests, property qualifications, and filing fees and ballot qualifications for candidates. Twenty-one

states, in recognition of the lack of any continued threat to the voting process in contemporary society and in recognition of the debilitating effects of second class citizenship, now permit ex-felons to vote.

The close of registration for the General Election, including the election of the President of the United States, occurs in 130 days. Approximately 100,000 California ex-convicts are presently ineligible to register. This petition seeks a writ of mandate to eliminate present unconstitutional denial of the right to vote by finding Article II, Section 1 and Article XX, Section 11 to be unconstitutional or alternately by limiting the application of those California sections in a manner consistent with the federal Constitution.

PETITIONERS

II.

Abran Ramirez is a Spanish-speaking farmworker who has lived in San Luis Obispo County for eight years. He and his wife have five children. He was convicted twenty-one years ago in Texas of robbery by assault. He served approximately three months in a Texas prison followed by ten years parole. He applied to register to vote on February 15, 1972 at the San Luis Obispo County Clerk's office. He was told that he would be ineligible to register in San Luis Obispo County because he had spent time in a state prison. The declaration of Abran Ramirez is attached as Exhibit A and incorporated herein by reference.

III.

Albert Lee is presently unemployed and lives with his wife and four children in Monterey County. In 1955 he was sentenced to two years in prison following a conviction for possession of dangerous drugs. He was discharged from parole two years after his release from prison. He sought to register to vote at the Monterey County Courthouse in Salinas on March 17, 1972. After he stated he had been convicted of a felony, he was referred to the County Clerk who told him he could not register. The declaration of Albert Lee is attached as Exhibit B and incorporated herein by reference.

IV.

Larry Gill has three convictions on his record, two for burglary and one for forgery. All three convictions were the result of his attempts to obtain money to support a narcotic addiction. Since his release from prison he successfully ended the drug addiction. He now lives in Stanislaus County with his wife and four children and is employed with the Gallo Wineries. He applied to register to vote at the Stanislaus County Registrar of Voters office on April 18, 1972. He was notified by a letter from the Stanislaus County Registrar that because of his convictions he could not register. The declaration of Larry Gill is attached as Exhibit C and incorporated herein by reference.

V.

Each of the individually named Petitioners is fully qualified to register to vote except for his felony conviction.

VI.

The foregoing Petitioners bring this action individually and on behalf of all other persons who are ineligible to register to vote in California solely by reason of a conviction of a felony other than an election code felony. This class consists of persons too numerous to mention and joinder of all parties is impracticable. There are common questions of law and fact concerning their rights. The claims of the named Petitioners are typical of the class, and they will fairly and adequately represent the class.

VII.

Los Pintos is a non-profit California association whose members are predominantly Mexican-American persons previously convicted of felonies. Its purposes are to aid the pinto/pinta in transition from captive society, to provide counseling in education, financial aid and housing, and to motivate through education.

VIII.

The 7th Step Foundation, Inc. (California Affiliates) is a non-profit California corporation. Its purposes are to promote and carry out programs for the rehabilitation, education and civic orientation of present and former inmates of correctional institu-

tions, and to educate the general public regarding the necessity and propriety of such programs.

A paramount objective of the Foundation is crime prevention and fostering of healthy social and psychological attitudes and behavior traits on the part of those who might have a tendency toward delinquent or antisocial behavior.

IX.

Prisoners' Union is a non-profit California corporation. Its purposes are to (1) end the denial of human and civil rights to ex-convicts; (2) obtain abolition of the indeterminate sentence; and (3) end economic exploitation of prisoners and ex-convicts.

X.

League of Women Voters of California is a non-profit California corporation whose purpose is "to promote informed and active participation of citizens in government. The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens . . . that every citizen should be protected in his right to vote; . . . and that no person or group should suffer legal, economic or administrative discrimination." On February 16, 1972, the League of Women Voters of California reached the specific consensus that "the right to register and vote should be restored to ex-felons."

RESPONDENTS

XI.

Edmund G. Brown, Jr., is the Secretary of State for the State of California. He is the chief election officer for the State of California.

XII.

Ernest Maggini is the County Clerk of Monterey County, California. Mervin Mattos is the Registrar of Voters of Stanislaus County, California. Ruth Warnken is the County Clerk of San Luis Obispo County, California. Each of the foregoing Respondents has the duty of determining for his respective county whether an ex-felon will be denied the right to vote.

XIII.

The Respondents named in the foregoing paragraph are sued individually and as representatives of the class of all other County Clerks and Registrars of Voters who have the duty of determining for their respective counties whether any ex-felon will be denied the right to vote. It is impractical because of their number to name and serve every member of the class. The issues and questions involved in this action are identical to every member of the class. The named Respondents will fairly and adequately represent the interest of the class.

THE LAW

XIV.

Article II, Section 1 of the California Constitution provides in pertinent part:

> [P]rovided, further, no alien ineligible to citizenship, no idiot, no insane person, *no person convicted of any infamous crime,* no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State. . .

Article XX, Section 11 of the California Constitution provides in pertinent part:

> Laws shall be made to exclude . . . from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes.

Penal Code § 2600 provides:

> A sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trust, authority, or power during such imprisonment.

Election Code § 389 provides:

> The County Clerk shall, in the first week of September in each year, examine the records of the courts having jurisdiction in the case of infamous crimes and the embezzlements or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have

been finally convicted of an infamous crime, or of the embezzlement or misappropriation of public money.

PRE-OTSUKA

XV.

Until the *Otsuka* decision in 1966 all persons convicted of any felony were prohibited from registering and voting. At that time this Court ruled that not all felonies were "infamous crimes".

POST-OTSUKA

XVI.

On February 17, 1972, Respondent Edmund G. Brown, Jr., sent a letter to Respondent County Clerks and Registrars of Voters stating:

> My office has received numerous inquiries as to when former convicted felons are permitted to register to vote. The Supreme Court's 1966 decision set forth broad principles, but I have been able to discover little or no data regarding the specific practices at the county level. Concern has been expressed to me that there may be a serious lack of uniformity throughout the state. In order to obtain some preliminary data as a first step toward clarification of this problem, I am asking you to complete and return to me the enclosed questionnaire.

The questionnaire asked (1) If the County had adopted written guidelines or other informal policy; (2) Who had authority to make determinations; (3) The number of applications by felons accepted and

rejected; and (4) The specific crimes for which registration had been permitted and denied.

XVII.

Forty-nine (49) of the fifty-eight (58) counties responded to the questionnaire. The results indicate a very wide disparity of practice and procedure. A complete copy of the responses are attached as Exhibit D and incorporated herein by reference. The following indicates various county practices:

[A] A person convicted of burglary who has been released from prison and parole would be registered if he lived in Alameda, Contra Costa, Fresno, Marin, San Joaquin, Sonoma, or Yuba Counties. He would be denied registration if he lived in El Dorado, San Bernardino, or Santa Cruz County.

[Z] Similarly at least eight counties (Yolo, Sonoma, Santa Clara, San Francisco, San Diego, Sacramento, Contra Costa, and Alameda) would register a robbery ex-felon whereas seven others (Siskiyou, Santa Cruz, San Joaquin, San Bernardino, Orange, Monterey, and Los Angeles) would not.

[C] Twenty-one counties indicate they will register one convicted of possession of dangerous drugs, but Butte and San Joaquin will not. San Bernardino will register one convicted of possession but not one convicted of use. Orange, San Bernardino, and Santa Cruz will register the first two but not sale of drugs. At least nine of the others register all three.

[D] Butte County indicated that it would not register one convicted of drunk driving causing

death but would register one convicted of wife beating. San Bernardino will not register one convicted of "sex charges" but will register an ex-felon convicted of child molesting. San Diego County will register one convicted of first degree murder but not one convicted of non-support. Los Angeles County will not register an ex-felon whose crime was statutory rape but apparently will register one who was guilty of forcible rape. Santa Clara permits registration if the crime was prostitution, but San Bernardino will not.

[E] Several counties register those convicted of embezzling, forgery, or insufficient funds. (Alameda, Colusa, Contra Costa, Marin, Riverside, Sacramento, Santa Clara and San Francisco) Santa Clara will register one convicted of income tax evasion but Los Angeles will not. San Joaquin registered one convicted of transporting counterfeiting tools but denied the franchise to another guilty of issuing bad checks.

[F] The responses of Sonoma and San Joaquin counties indicate that they have a two conviction rule. There persons convicted of *two* non-infamous crimes such as assault and armed robbery will not be registered because two non-infamous crimes are apparently equivalent to one infamous crime.

[G] Tuolomne County indicates that it incorporates in its definition of "infamous crime" the list set out in *Words & Phrases,* Vol. 21, p. 539. That list includes assault, burglary, conspiracy, excise laws, fornication, gaming, liquor laws, and willful neglect of wife. It is followed by fifteen pages of discussions which are apparently not incorporated into the definition and which in the

case of liquor laws, for instance, indicate that the listed crime is in fact not "infamous".

XVIII.

The hodge-podge of practices which have been adopted have resulted in county of residence being a decisive factor in whether registration will be permitted. As a result, the personal moral code of individual clerks determines which ex-felons will be granted the franchise.

EARLY VOTING PRACTICES

XIX.

At the time of the adoption of the 1849 Constitution, voting fraud was recognized by the framers as a grave threat to the integrity of the election process.

IRREGULAR BALLOTS

XX.

When the Constitution was adopted each party and each candidate could and did print its own ticket, the candidate's ticket was distributed and the voter cast his vote by depositing one of the two tickets in the ballot box. A ballot was valid although a printed name had been scratched out and another candidate's name written in. The tickets varied in size and color.

NO REGISTRATION

XXI.

In 1849 there was no registration of voters and every person could vote. Double and triple voting was

common. Large crowds composed of certain candidates and their friends surrounded the polling places and discouraged voters favoring opposition candidates from approaching the ballot box. Prospective voters were actually rounded up like cattle, confined in corrals, given liquor and other payment for their vote and led to the ballot box the next day to dutifully deposit in the box the ticket handed to them.

PRESENT VOTING PRACTICES

XXII.

Today voting in California is done either by machine or by a paper ballot printed by the State, numbered in sequence, uniform in size and color, and obtainable only at the polling place by a duly appointed election official. It is practically impossible for a fraudulent ballot to be cast on the machines currently used in California. No person is permitted to vote unless he has previously registered.

XXIII.

As a result of the extensive statutory safeguards relating to elections, voting fraud does not exist in California today. The last reported case of any election code violation was in 1919. The Clerk of the California Bureau of Criminal Statistics reports that there has been no conviction for election-related offenses during the 18 years he has been with the Bureau. The declaration of James Mattesich is attached as Exhibit E and incorporated herein by reference.

TWENTY-ONE STATES CONSIDER EX-FELONS NO THREAT TO BALLOT BOX

XXIV

Forty percent of the states, as of now, either do not disenfranchise those convicted of a felony (4 states), only disqualify those convicted of an election code violation (2 states) or have provided an automatic restoration of civil rights upon completion of sentence (15 states). The twenty-one states are: Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, and Wisconsin.

The "Uniform Act on the Status of Convicted Persons" restores full civil rights upon completion of prison term and parole.

Extending the franchise to ex-felons in the foregoing states has in no way violated the purity of the ballot box.

THE CLEAR TREND IS TOWARD ELIMINATION OF RESTRICTIONS ON THE FRANCHISE

XXV.

Long established and traditional conditions on the election process previously considered valid have been struck down or abandoned. These include residency

requirements, literacy tests, property qualifications, and filing fees and ballot qualifications for candidates.

XXVI.

The President's Commission on Law Enforcement and the Administration of Justice emphasized in its findings the necessity of "reintegrating offenders through active intervention on their behalf with community institutions" and warned against community restrictions which "lock out" the person who carries a criminal stigma. The Commission recommended adoption of the Model Penal Code approach of automatically restoring civil rights to ex-convicts upon completion of incarceration and parole.

XXVII.

The President's Commission on the Causes and Prevention of Violence similarly concluded after months of hearings and study of civil disorder in this country that denial of the right to vote tends to alienate people (particularly young people) and "to drive them into a search for an alternative, sometimes violent means to express their [feelings]."

XXVIII.

During April of 1972, the League of Women Voters of the United States of America published their study on obstacles to voting. In their summary they noted:

> In a democratic society, no right is more fundamental than the right of every citizen to vote.

Indeed, the vote is the very symbol of democracy. . . .

In studying the way our current election system is administered, the League of Women Voters Education Fund found that the administrative practices of local election officials and therefore citizens' access to the election system vary greatly from place to place, that many state election officials have not established structures and procedures which would insure uniform interpretation and administration of state election codes throughout each state and that the discretion which most state laws give to local election officials is often exercised in a manner which impedes rather than enhances the citizen's right to vote.

. . . Citizens must no longer be forced to earn the 'privilege' but rather must be insured the *right* to vote. . . .

XXIX.

In the Spring of 1971, the Ford Foundation funded a study of registration and voting throughout the United States. A part of this study included a survey of attitudes toward voter eligibility. In the survey, conducted by the Education Fund of the League of Women Voters, the opinions were obtained from a representative sample of 16 categories of community organizations. Each was asked whether persons convicted of a felony and released from prison should be eligible to vote. The results were as follows:

Democratic Party Chairmen	80%	in favor
Republican Party Chairmen	65%	"
Third Party Chairmen	66%	"
County Board of Elections Chairmen	68%	"
City Board of Elections Chairmen	83%	"
Mayors	75%	"
City Managers	76%	"
City Council Presidents	79%	"
Board of County Commissioners Chairmen	74%	"
League of Women Voters	93%	"
National Association for the Advancement of Colored People	92%	"
Labor Council Presidents	88%	"
Youth Groups	97%	"
Chamber of Commerce Presidents	81%	"
American Legion Commanders	68%	"
Non-Black Minority Groups	95%	"

At least two-thirds (⅔) of every group sampled felt that ex-felons should be entitled to vote. A copy of the report of the survey is attached as Exhibit F and incorporated herein by reference.

MOST EX-FELONS UNABLE TO VOTE ARE MINORITY AND LOW-INCOME

XXX.

Records kept by the State of California indicate that there are approximately 100,000 ex-felons in California who would be eligible to register but for the felony disqualification. Prison statistics indicate that 49% of persons convicted of felonies are Black or

Chicano. The state population is composed of only 24% Blacks and Chicanos. The Bureau of Criminal Statistics estimate that 90% of convicted felons were earning less than $5,000 annually. The declaration of Philip J. Jimenez is attached as Exhibit G and incorporated herein by reference.

PARDON

XXXI.

Pardon is not a practical or effective device for obtaining franchise. During the four year period from 1968 thru 1971 only 282 pardons were granted. During this period 34,262 men and women were released from state prisons. A copy of the declaration of James Mattesich is attached as Exhibit H and incorporated herein by reference.

REHABILITATION

XXXII.

Petitioner Larry Gill in his declaration marked as Exhibit C states:

> Now that I'm not against society, not preying on society, and I'm standing on my own two feet, voting is a right I should have. If I can vote, my past won't be my present. My present should be my present. The state won't let it rest, you pay forever. We should be entitled to this reward; an ex-felon has to work harder to earn it more than anyone else.

XXXIII.

The Registrar of Voters of Orange County, California in responding to the Secretary of State's questionnaire stated:

As a matter of equity, it seems to me that a convicted felon who has paid his debt to society should not be denied forever his right to vote. I believe that restoration of the voting privilege should be a positive step in the rehabilitation process of a convicted criminal.

CONCLUSIONS OF SECRETARY OF STATE'S REPORT

XXXIV.

In response to Secretary of State Brown's survey, fifteen percent of the counties responding gratuitously expressed the need for definitive guidelines (El Dorado, Kern, Orange, San Diego, Santa Barbara, Santa Cruz, and Ventura). Only two of the counties (Los Angeles and San Mateo) have developed any written guidelines of their own. The Secretary of State in his finding stated that:

> Although the policy within most counties may be consistent the fact that some counties have adopted different policies has created a situation in which there is a lack of uniformity across the state. It appears from the survey that a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others. . . .
>
> Based on the survey the Secretary of State strongly concurs in this conclusion and urges the legislature or the courts to act in this regard in time for the presidential election in November 1972.

A copy of the Secretary of State's report is attached as Exhibit I, and incorporated by reference herein.

CONSTITUTION VIOLATED

XXXV.

Withholding of the right to vote because of county of residence and the particular moral code of the clerk of that county denies petitioners due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

XXXVI.

Denial of the right to vote to ex-felons after completion of their prison term and parole for a felony conviction other than an Election Code violation denies them due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

ACTION BY THIS COURT IS REQUIRED

XXXVII.

On November 7, 1972, this Nation's electors will cast their ballots for President of the United States. In California registration for this election closes on October 7, 1972. This is 130 days from the date of the filing of this action. Petitioners have no plain, speedy, or adequate remedy other than this action. The 130 days is not sufficient time to allow petitioners to obtain redress in the 58 counties by any other means. Unless this Court issues its alternative and peremptory writs, petitioners will be denied the right to vote in the general election and will suffer irreparable injury.

Wherefore, petitioners pray that:

1. An alternative writ of mandate be issued commanding respondents to register to vote all ex-felons whose term of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote, or to show cause before this Court why they have not done so;

2. On a hearing of this application and the return thereto, if any, this Court issue its peremptory writ of mandate commanding respondents to register to vote all ex-felons whose term of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote;

3. For costs of this suit; and

4. For such other and further relief as justice may require.

May 31, 1972.

Respectfully submitted,

Burton D. Fretz
Charlotte M. Fischman
Martin R. Glick
Philip J. Jimenez
David Kirkpatrick
Gene Livingston
Donald G. Green
Sarel M. Kandell

By Martin R. Glick
Attorneys for Petitioners

In the Supreme Court of the State of California

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Abran Ramirez, Larry Gill, Albert Lee, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,
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EXHIBITS TO PETITION FOR WRIT OF MANDATE

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POOR COPY

TABLE 3. NUMBER AND PERCENT OF ORGANIZATIONAL REPRESENTATIVES BY POSITION WHO BELIEVE THAT FELONIES, MISDEMEANANTS AND UNDER-AGED SHOULD BE ELIGIBLE TO VOTE.

Statement	Party Positions: DP	RP	TP	Election Boards: COEE	CIEE	Executive/Administrative: M	CM	PCC	BCC	Voluntary Organizations: LWV	CA/CP	LCF	YG	PCC	CAL	NG	Score: Low	High
N =	201	200	41	158	86	193	111	79	175	219	119	166	61	273	144	63		
	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
A. Persons who have been convicted of a felony but who have been released from prison.	80	65	66	68	83	75	76	79	74	93	52	88	97	81	69	95	65	97
B. Persons who have been in a mental institution but are not currently under treatment.	91	86	81	87	91	90	89	90	88	96	87	92	95	94	83	92	81	96
C. Persons who are on welfare.	96	89	68	94	97	93	95	95	89	99	95	88	100	93	94	100	68	100
D. Persons who have been previously convicted of an election offense.	67	46	51	49	50	55	60	44	51	63	57	53	66	49	38	45	38	67
E. Persons who are continuously in minor trouble with the law.	91	85	85	85	90	90	94	85	78	92	84	88	95	86	76	94	76	95
F. College students who are from another city (even if they are (a) old enough to vote and (b) have attended the college in the community for more than a year.	76	37	51	46	33	48	50	39	45	79	81	73	92	49	49	91	33	92
G. Persons who have been dishonorably discharged from the armed forces.	71	55	68	59	66	59	73	64	57	90	81	64	98	61	50	86	39	98
H. Persons who have refused to serve in the military services.	70	50	51	50	57	57	76	54	47	93	78	53	93	59	25	82	25	93
I. American citizens living on Federal reservations.	95	92	88	96	93	95	93	96	93	99	97	98	98	98	95	100	88	100
J. Persons who identify themselves as communists.	68	61	56	59	66	54	70	50	62	86	59	64	92	51	31	95	31	92
K. Persons under 21 years of age.	95	81	78	90	90	90	78	85	87	97	93	95	100	84	81	94	78	100
L. In school levy elections, persons not paying property taxes.	76	62	59	58	67	75	84	64	69	95	85	76	88	72	48	87	48	89
M. Persons who cannot read or write English.	87	67	66	77	67	81	88	71	75	88	91	85	95	72	64	93	64	95
N. Persons serving in the military but overseas.	97	99	95	98	97	95	96	97	97	97	92	97	100	96	97	78	92	100
O. Civilians living overseas for periods longer than 5 months.	90	87	88	86	86	80	78	76	82	83	82	81	76	76	77	79	75	79
P. Persons who are retired.	97	99	98	98	98	97	96	95	97	99	96	99	100	98	99	100	96	100

N refers to the number of respondents for the first statement. All percents computed on actual N's but sample sizes not reported in this table.

Positions are identified as follows:

DP = Democratic Party Chairman
RP = Republican Party Chairman
TP = Third Party Chairman
COEE = County Board of Elections Chairman
CIEE = City Board of Elections Chairman
M = Mayor
CM = City Manager
PCC = City Council President
BCC = Board of County Commissioners Chairman
LVV = League of Women Voters
NAACP = National Association for the Advancement of Colored People
LCF = Labor Council President
YG = Youth Groups
PCC = Chamber of Commerce President
CAL = American Legion Commander
MG = Homeless Minority Groups

Exhibit I

(Letterhead of
Secretary of State
State of California
111 Capitol Mall
Sacramento, California 95814)

May 30, 1972

REPORT OF SECRETARY OF STATE REGARDING THE RIGHT TO VOTE OF EX-FELONS IN CALIFORNIA

A recent survey of California elections officials was conducted by the office of the Secretary of State regarding the right of ex-felons to vote under Article 2, Section 1 of the California Constitution. The survey was conducted by means of a questionnaire which was sent to the county clerk or registrar of voters in each of the fifty-eight California counties. Forty-nine counties (84%) responded.

The questionnaire included the following questions:

1. Do you have written guidelines for determining whether or not a former felon is eligible to register to vote?
2. If there are no written guidelines, have policies been developed in your county for determining whether or not a former felon is eligible to register to vote?
3. What person(s) have authority to determine the eligibility of a former felon to register to vote?

4. How many former felons have been permitted to register and how many have been denied registration because of their criminal records?
5. State specific crimes for which registration has been permitted or denied.

The following general conclusions resulted from the survey:

1. Most of the counties surveyed have given careful consideration to the problem and have attempted to develop consistent criteria for determining which ex-felons shall be entitled to register. In some counties these policies have been formalized in writing, but in most instances a case-by-case method has been used.
2. Although the policy within most counties may be consistent, the fact that some counties have adopted different policies has created a situation in which there is a lack of uniformity across the state. It appears from the survey that a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others.
3. In order to remedy this lack of uniformity, authoritative guidelines from either the legislature or the courts are urgently needed.

Specific findings on which these general conclusions were based include the following:

1. Of the forty-nine counties which responded, only two had issued written guidelines for de-

termining voting eligibility of ex-felons. These two counties compiled lists of crimes for which an applicant is considered eligible or ineligible. In addition, six counties have a general policy of registering all former felons except those convicted of Election Code violations, embezzlement, or misappropriation of public funds. These six counties have not reduced this policy to writing, apparently because the simplicity of the policy has made written regulations unnecessary.

2. The remaining counties determine whether a former felon is eligible to vote on a case-by-case basis. Most of these counties refer each case to their county counsel or other legal officer for the ultimate decision.

3. It is impossible to estimate reliably the number of ex-felons in California who have been permitted or denied registration because many counties keep no records from which such information can be obtained. In the counties where records were kept which made estimates possible, the figures ranged from 100% of those who applied having been permitted to vote, to 100% of those who applied having been denied the vote. It appears, however, that in most counties the majority of ex-felons have been permitted to register, particularly in those counties where large numbers have applied.

4. The greatest disparities which appeared in the survey came in the listings of felonies which did or did not disqualify a person from voting. A concise tabulation of results is impossible, because of the large numbers of felonies that were listed and because of the varying practices in the different counties. A complete tabulation is available for public inspection in the office of the Secretary of State in Sacramento. A few examples may illustrate the lack of uniformity.

a. The crime of murder disqualifies a person from voting in at least four counties, but does not disqualify in at least six counties. In one additional county, first degree murder disqualifies, but not second degree murder.

b. Sale of drugs disqualifies an applicant in at least five counties, but not in at least nine counties.

c. Persons convicted of robbery have been permitted to vote in at least eight counties, but not in at least seven counties.

d. A person convicted of a felony under the Election Code would probably be denied the right to vote in every county.

e. A person convicted of refusal of induction into the armed forces would apparently be permitted the right to vote in each county.

f. As to every other felony, however, it appears that some counties might deny the right to vote while other counties would grant it.

Although no specific question of the questionnaire dealt with the absence of statewide guidelines, officials from seven counties stated that guidelines were needed which would set forth a uniform authoritative state policy.

Based on the survey, the Secretary of State strongly concurs in this conclusion and urges the legislature or the courts to act in this regard in time for the presidential elections in November 1972.

3. (YES--REGISTERED NO--REFUSED REGISTRATION)	Bigamy	"Sodomy"	Homosexuality	"Rape"	Statutory Rape	Embezzlement
ALAMEDA 1/	No	Yes	Yes	Yes	Yes	Yes
ALPINE Unclear						
AMADOR Unclear						
BUTTE		No	No	No	No	No
CALAVERAS						No
COLUSA						
CONTRA COSTA 1/	No	Yes	Yes	Yes	Yes	Yes
DEL NORTE						
EL DORADO 2/						
FRESNO		Yes	Yes	Yes		
GLENN Unclear						
IMPERIAL 2/		Yes				No--public
INYO 2/						No
KINGS Unclear						
LAKE 2/ Must receive pardon						
LASSEN		Yes				No
LOS ANGELES 2/		Yes-m	Yes-m			
MADERA 2/ Unclear						
MARIN		Yes		Yes-(LSD)		
MENDOCINO Unclear						
MERCED Unclear						
MODOC Unclear						
MONO		Yes				
MONTEREY 2/						
NAPA Unclear						
NEVADA Unclear						
ORANGE		Yes-m		No		No
PLACER Unclear						
RIVERSIDE 2/		Yes-m				No--public
SAN BENITO 2/ Unclear						
SAN BERNARDINO		Yes	No	No	Yes - felony	
SACRAMENTO 1/	No	Yes	Yes	Yes	Yes	Yes
SAN DIEGO 2/		Yes				No
SAN FRANCISCO 1/	No	Yes	Yes	Yes	Yes	No--public
SAN JOAQUIN 2/		No		No		
SANTA BARBARA		Yes				
SAN MATEO	No	Yes-m	Yes-m	Yes-m		
SANTA CLARA 2/		Yes	Yes	Yes		
SANTA CRUZ				No		
SHASTA Unclear						
SISKIYOU		Yes-m				
SOLANO		Yes	Yes	Yes		
SONOMA		Yes		Yes		
TEHAMA Unclear						
TULARE Unclear						
TUOLUMNE 2/						No
VENTURA		Yes				
YOLO	No	Yes				
YUBA						

2. (YES--REGISTERED) (NO--REFUSED REGISTRATION)		Wife Beating Yes	Forgery Yes	Misappropriation of public funds Yes	Murder Yes	Rape Yes	Malfeasance Yes	Robbery Yes
ALAMEDA								
ALPINE	Unclear							
AMADOR	Unclear							
BUTTE		Yes						
CALAVERAS			No					
COLUSA			Yes					
CONTRA COSTA		Yes	Yes	No	Yes	Yes	Yes	Yes
DEL NORTE								
EL DORADO			No					
FRESNO								
GLENN	Unclear							
IMPERIAL								
KERN			No	No			No	
KINGS	Unclear							
LAKE	Must receive pardon							
LASSEN								
LOS ANGELES			No			No Stat.	No	No
MADERA	Unclear							
MARIN			Yes-grade			Yes Stat.		
MENDOCINO	Unclear							
MERCED	Unclear							
MODOC	Unclear							
MONO								
MONTEREY			No				No	No-armed
NAPA	Unclear							
NEVADA	Unclear							
ORANGE				No		Yes		No-armed
PLACER	Unclear							
RIVERSIDE			Yes		Yes/2nd deg.			
SAN BENITO	Unclear							No
SAN BERNARDINO			No		No/2nd deg.			
SACRAMENTO		Yes	No	Yes	Yes	Yes	No	Yes
SAN DIEGO		Yes	No		Yes	Yes		Yes
SAN FRANCISCO		Yes	No	No	Yes	Yes	No	Yes
SAN JOAQUIN			No					No-armed
SANTA BARBARA				No	No			
SAN MATEO			No		No/2nd deg.	No	No	No
SANTA CLARA			No		Yes-2nd deg.	Yes		Yes-armed
SANTA CRUZ			No		No		No	No-armed
SHASTA	Unclear							No-armed
SISKIYOU								
SOLANO			No					Yes
SONOMA			No		No			
TEHAMA	Unclear							
TULARE	Unclear							
TUOLUMNE				No				
VENTURA								
YOLO			No	No			No	Yes
YUBA								

3. (NO--REFUSED REGISTRATION)		Assault	Manslaughter	Burglary	Felony Offenses	Felony	Bribery
ALAMEDA		Yes	Yes	Yes	Yes		Yes
ALPINE	Unclear						
AMADOR	Unclear						
BUTTE							
CALAVERAS							
COLUSA							
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE				Yes 1/			
EL DORADO				No	No		
FRESNO				Yes			
GLENN	Unclear						
IMPERIAL						No	
KERN							No
KINGS	Unclear						
LAKE	Must receive pardon						
LASSEN							
LOS ANGELES					No		No
MADERA	Unclear						
MARIN				Yes			
MENDOCINO	Unclear						
MERCED	Unclear						
MODOC	Unclear						
MONO							
MONTEREY							No
NAPA	Unclear						
NEVADA	Unclear						
ORANGE							
PLACER	Unclear						
RIVERSIDE		Yes-Aggr.	Yes				
SAN BENITO	Unclear						
SAN BERNARDINO		Yes		No			
SACRAMENTO		Yes	Yes	Yes	Yes	Yes	No
SAN DIEGO		Yes	Yes				
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes	No
SAN JOAQUIN		2/		Yes			
SANTA BARBARA							
SAN MATEO				No			No
SANTA CLARA							
SANTA CRUZ				No			No
SHASTA	Unclear						
SISKIYOU							
SOLANO		Yes					
SONOMA		No 3/		Yes			
TEHAMA	Unclear						
TULARE	Unclear						
TUOLUMNE							No
VENTURA							
YOLO							No
YUBA				Yes			

4. (YES--REGISTERED
(NO--REFUSED REGISTRATION)

		Perjury	Desertion	Grand Larceny	Auto Theft	Draft Evasion	Attempted Robbery	Insufficient Funds
ALAMEDA		Yes	Yes	Yes	Yes	Yes	Yes	Yes
ALPINE	Unclear							
AMADOR	Unclear							
BUTTE								
CALAVERAS								
COLUSA								
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE								
EL DORADO				No				
FRESNO								
GLENN	Unclear							
IMPERIAL								
KERN		No						
KINGS	Unclear							
LAKE	Must receive pardon							
LASSEN								
LOS ANGELES		No	No	No	No	No	No	No
MADERA	Unclear							
MARIN					Yes			
MENDOCINO	Unclear							
MERCED	Unclear							
MODOC	Unclear							
MONO								
MONTEREY		No						
NAPA	Unclear							
NEVADA	Unclear							
ORANGE								
PLACER	Unclear							
RIVERSIDE								
SAN BENITO	Unclear							Yes
SAN BERNARDINO								
SACRAMENTO		No	Yes	Yes	Yes	Yes	Yes	No
SAN DIEGO		No						Yes
SAN FRANCISCO		No	Yes	Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN			No	No		No		No
SANTA BARBARA					Yes			
SAN MATEO		No		No				
SANTA CLARA		No			Yes	Yes		Yes
SANTA CRUZ		No	No	No				No
SHASTA	Unclear							
SISKIYOU								
SOLANO				No				
SONOMA								
TEHAMA	Unclear							
TULARE	Unclear							
TUOLUMNE								
VENTURA		No						
YOLO								
YUBA		No			Yes			

5. (YES--REGISTERED) (NO--REFUSED REGISTRATION)		Arson Yes	Child Molesting Yes	False Bomb Yes	Extortion Attempt Yes	Peace Officer Yes	Kidnapping Yes
ALAMEDA							
ALPINE	Unclear						
AMADOR	Unclear						
BUTTE							
CALAVERAS							
COLUSA							
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE							
EL DORADO							
FRESNO							
GLENN	Unclear						
IMPERIAL							
KERN							
KINGS	Unclear						
LAKE	Must receive pardon						
LASSEN							
LOS ANGELES		No	No				
MADERA	Unclear						
MARIN				Yes	Yes		
MENDOCINO	Unclear						
MERCED	Unclear						
MODOC	Unclear						
MONO							
MONTEREY					Yes		
NAPA	Unclear						
NEVADA	Unclear						
ORANGE							
PLACER	Unclear						
RIVERSIDE							
SAN BENITO	Unclear						
SAN BERNARDINO			Yes			No	No
SACRAMENTO		Yes	Yes	Yes	Yes	Yes	Yes
SAN DIEGO			Yes		Yes		Yes
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN			No				
SANTA BARBARA							
SAN MATEO							
SANTA CLARA		Yes	Yes		Yes	Yes	
SANTA CRUZ							
SHASTA	Unclear						
SISKIYOU							
SOLANO							
SONOMA							
TEHAMA	Unclear						
TULARE	Unclear						
TUOLUMNE		No					
VENTURA							
YOLO							Yes
YUBA					Yes		

6. (YES--REGISTERED)
(NO--REFUSED REGISTRATION)

		Prostitution	Pimping	Pimp Support	Smuggling	Theft	Indecent Exposure	Obscene Matter
ALAMEDA		Yes	Yes	Yes	Yes	Yes	Yes	Yes/Mail
ALPINE	Unclear							
AMADOR	Unclear							
BUTTE								
CALAVERAS								
COLUSA								
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE								
EL DORADO								
FRESNO								
GLENN	Unclear							
IMPERIAL								
KERN								
KINGS	Unclear							
LAKE	Must receive pardon							
LASSEN								
LOS ANGELES								
MADERA	Unclear							
MARIN								
MENDOCINO	Unclear							
MERCED	Unclear							
MODOC	Unclear							
MONO								
MONTEREY								
NAPA	Unclear							
NEVADA	Unclear							
ORANGE								
PLACER	Unclear							
RIVERSIDE								
SAN BENITO	Unclear							
SAN BERNARDINO		No						
SACRAMENTO		Yes	Yes	Yes	Yes	Yes	Yes	Yes
SAN DIEGO			No	No	Yes	Yes	Yes	
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN			No					Yes
SANTA BARBARA								
SAN MATEO								
SANTA CLARA		Yes					Yes	
SANTA CRUZ			No					
SHASTA	Unclear							
SISKIYOU								
SOLANO								
SONOMA								
TEHAMA	Unclear							
TULARE	Unclear							
TUOLUMNE								
VENTURA								
YOLO								
YUBA				Yes			Yes	

7. (NON-REVOKED REGISTRATION)		Encouragement of Yes	Transportation of Yes	Arson Yes	Mahem Yes	Abortion Yes
ALAMEDA						
ALPINE	Unclear					
AMADOR	Unclear					
BUTTE						
CALAVERAS						
COLUSA						
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes
DEL NORTE						
EL DORADO						
FRESNO						
GLENN	Unclear					
IMPERIAL						
KERN						
KINGS	Unclear					
LAKE	Must receive pardon					
LASSEN						
LOS ANGELES			Yes-m			Yes
MADERA	Unclear					
MARIN						
MENDOCINO	Unclear					
MERCED	Unclear					
MODOC	Unclear					
MONO						
MONTEREY						
NAPA	Unclear					
NEVADA	Unclear					
ORANGE						
PLACER	Unclear					
RIVERSIDE						
SAN BENITO	Unclear					
SAN BERNARDINO			Yes			
SACRAMENTO		Yes	Yes	Yes	Yes	Yes
SAN DIEGO						
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN		Yes	Yes			
SANTA BARBARA				No		
SAN MATEO			Yes-m	No	No	
SANTA CLARA			Yes	Yes		
SANTA CRUZ				No	No	
SHASTA	Unclear					
SISKIYOU						
SOLANO			Yes			
SONOMA				Yes (Attempt)		
STANISLAUS	Unclear					
TULARE	Unclear					
TUOLUMNE						
VENTURA						
YOLO						
YUBA						

8. (YES--REGISTERED) (NO--REFUSED REGISTRATION)		Extortion	Footnotes
ALAMEDA		Yes	
ALPINE	Unclear		1/ Indicates "all others are registered".
AMADOR	Unclear		2/ Any person placed on probation who does not actually serve time will be registered.
BUTTE			
CALAVERAS			3/ One person convicted of second degree burglary, given a suspended sentence and probation, was permitted to register.
COLUSA			
CONTRA COSTA		Yes	
DEL NORTE			4/ Their standard is non-registration of persons who "constitute a practical threat to the elective process and no alternative exists that will protect the elective process".
EL DORADO			
FRESNO			
GLENN	Unclear		5/ "Our position generally has been on the lenient side to restore the right of the individual to vote".
IMPERIAL			
KERN			6/ "Crimes of violence felons" may register.
KINGS	Unclear		
LAKE	Must receive pardon		7/ Apparently an ex-felon convicted of assault and armed robbery was denied while an ex-felon convicted of burglary and assault with a deadly weapon was permitted to register.
LASSEN			
LOS ANGELES			
MADERA	Unclear		8/ Was denied for combination of assault and grand larceny.
MARIN			
MENDOCINO	Unclear		
MERCED	Unclear		9/ Incorporated in their definition of "infamous crime" the list sets out in West's California Digest, Vol. 21, Words and Phrases at 539.
MODOC	Unclear		
MONO			
MONTEREY			
NAPA	Unclear		
NEVADA	Unclear		
ORANGE			
PLACER	Unclear		
RIVERSIDE		Yes	
SAN BENITO	Unclear		
SAN BERNARDINO			
SACRAMENTO		Yes	
SAN DIEGO			
SAN FRANCISCO		Yes	
SAN JOAQUIN			
SANTA BARBARA			
SAN MATEO			
SANTA CLARA			
SANTA CRUZ			
SHASTA	Unclear		
SISKIYOU			
SOLANO			
SONOMA			
TEHAMA	Unclear		
TULARE	Unclear		
TUOLUMNE			
VENTURA			
YOLO			
YUBA			

In the Supreme Court of the State of California

In Bank

S.F. No. 22916

Ramirez (Abran) et al.

v.

Brown, as Secretary of State, etc., et al.

[Filed Sept. 7, 1972]

ORDER GRANTING ALTERNATIVE WRIT

Let an alternative writ of mandamus issue, to be heard before this court when the proceeding is ordered on calendar.

The alternative writ is to be issued, served and filed on or before September 13, 1972.

The written return to the writ is to be served and filed on or before September 29, 1972.

Wright
Chief Justice

I, G. E. Bishel, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this day of Sept. 7 1972 A.D. 19....

G. E. Bishel, Clerk
By R. C. Matteoli
Deputy Clerk

In the Supreme Court of the State of California

S.F. No. 22916

Abran Ramirez, et al., Petitioners,

vs.

Edmund G. Brown, Jr., et al., Respondents.

ALTERNATIVE WRIT OF MANDATE

The People of the State of California to the Respondents, Edmund G. Brown, Jr., Secretary of State of the State of California; Ernest Maggini, County Clerk for the County of Monterey County; Mervin Mattos, Registrar of Voters of Stanislaus County; Ruth Warnken, County Clerk of the San Luis Obispo County, individually and as representatives of the class of all other County Clerks and Registrars of Voters:

Good Cause Appearing from the verified petition on file you are hereby ordered to register to vote all ex-felons whose term of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote, or in the alternative to appear before this Court at its courtroom when the matter is put on calendar then and there to show cause why you have not done so.

This alternative writ is to be issued, served and filed on or before September 13, 1972.

Written return to this alternative writ is to be served and filed on or before September 29, 1972.

Witness, the Honorable Donald R. Wright, Chief Justice of the Supreme Court of California.

Dated, September 12, 1972.

Attested by my hand and the Seal of this Court this 12th day of September, 1972.

(Seal) G. E. Bishel
Clerk of the Supreme Court

By: R. C. Matteoli
Deputy Clerk

Duncan M. James, District Attorney
County of Mendocino
P. O. Box 185
Ukiah, California 95482
Telephone: 462-4731, Ext. 231
Attorney for Interveners

In the Supreme Court of the State of California

S.F. No. 22916

Abran Ramirez, et al.,
Petitioners,
vs.
Edmund G. Brown, Jr., Secretary of State of the State of California, et al.,
Respondents.

COMPLAINT IN INTERVENTION

Interveners Viola N. Richardson and Duncan M. James allege:

I

Heretofore, the Court granted interveners leave to intervene in this action and file their complaint in intervention.

II

Intervener Viola N. Richardson is the County Clerk and Registrar of Voters of the County of Mendocino, State of California. In said capacity, she has the

legal duty to register for any and all elections individuals who qualify as electors under the Constitution and laws of the State of California.

III

Intervener Duncan M. James is the District Attorney-Public Administrator and County Counsel for the County of Mendocino, State of California. As such, he has the legal duty to advise county officials as to the law and, under the practices of Mendocino County, has the responsibility for determining the eligibility of individuals to register to vote in any and all local, county, or state elections. Duncan M. James has the legal duty to make such determinations in accordance with the laws and Constitution of the State of California and the United States of America.

IV

* * *

Restatement of paragraph II, Petition for Writ of Mandate, *supra* this appendix.

V

* * *

Restatement of paragraph III, Petition for Writ of Mandate, *supra* this appendix.

VI

* * *

Restatement of paragraph IV, Petition for Writ of Mandate, *supra* this appendix.

VII

* * *

Restatement of Paragraph V, Petition for Writ of Mandate, *supra* this appendix.

VII

* * *

Restatement of paragraph VI, Petition for Writ of Mandate, *supra* this appendix.

IX

* * *

Restatement of paragraph VII, Petition for Writ of Mandate, *supra* this appendix.

X

* * *

Restatement of paragraph VIII, Petition for Writ of Mandate, *supra* this appendix.

XI

* * *

Restatement of paragraph IX, Petition for Writ of Mandate, *supra* this appendix.

XII

* * *

Restatement of paragraph X, Petition for Writ of Mandate, *supra* this appendix.

XIII

* * *

Restatement of paragraph XI, Petition for Writ of Mandate, *supra* this appendix.

XIV

* * *

Restatement of paragraph XII, Petition for Writ of Mandate, *supra* this appendix.

XV

The respondents named in the foregoing paragraph are sued individually and as representatives of the class of all other county clerks and registrars of voters who have the duty of determining for their respective counties whether any ex-felon will be denied the right to vote. The issues and questions involved in this action are identical to every member of the class.

XVI

Petitioners commenced this action against respondents for a writ of mandate and declaratory relief to strike down certain provisions of the Constitution of the State of California pertaining to the ability of convicted felons to vote. The action is now pending in this Court and trial thereof has not been held.

XVII

Intervener Viola Richardson is a member of the "class of all other County Clerks and Registrars of Voters" named in the petition for writ of mandate

and declaratory relief now before this Court. As such, intervener Viola Richardson has both an interest in the matter in litigation and an interest in the success of respondents in this action.

XVIII

The interests of intervener Viola Richardson are not being adequately represented by the "representatives" chosen to represent the class. Ernest Maggini, County Clerk of the County of Monterey, is represented by William Stauffers, County Counsel of the County of Monterey, who has not and will not file in opposition to the declaratory judgment sought in this case. Mervin Mattos, Registrar of Voters of Stanislaus County, is represented by Deputy County Counsel Martz who has not and will not file in opposition to the declaratory judgment sought. Ruth Warnken is represented by Robert N. Tate, District Attorney of San Luis Obispo County, who has not and will not file in opposition to the declaratory judgment sought in this case.

XIX

Intervener Viola N. Richardson was prevented from intervening earlier in this case by the failure of Edmund G. Brown, Jr., the Secretary of State, to inform the County Clerks that they were being sued. The Secretary of State normally includes in periodic bulletins to the various clerks and registrars through the state information pertinent to their functions. This suit was omitted in an apparent attempt to prevent opposition to the declaratory judgment sought.

XX

Respondent Edmund G. Brown, Jr., cannot and does not represent the interests of intervener Viola N. Richardson in that his personal views, which are of public record, conflict with the position of intervener and with the Constitution of the State of California. Respondent Edmund G. Brown, Jr., has allowed his personal views to block a proper prosecution of this case by the Attorney General, and, unless intervener is granted leave to intervene, the intent of the California Constitution may be circumvented by the tacit acquiescence of respondent Edmund G. Brown, Jr.

XXI

Interveners Duncan M. James and Viola M. Richardson are presently litigating in the case of *Richardson v. James and Richardson* (1972), No. 32973, Superior Court of California in and for the County of Mendocino. Interveners were successful in opposing a petition for writ of mandate and declaratory relief in that case and presently face an appeal to the District Court of Appeal.

XXII

The facts in *Richardson v. James and Richardson*, supra, are nearly identical to those in the case at bar (findings of fact and conclusions of law from that case are attached hereto and incorporated herein by reference as interveners' Exhibit A). Interveners fear that an adverse decision in this case will be a binding

precedent in their case before the District Court of Appeal.

XXIII

Interveners have an interest against respondents in this case in that interveners' position on the voting status of all felons finally discharged from parole who have been convicted of non-Elections Code violations.

XXIV

Interveners' position is that the court spoke clearly in *Otsuka v. Hite* (1966), 64 C2d 596, and *Young v. Gnoss* (1972), 7 C3d 18, 22, when it said disenfranchisement might be used only against "those guilty of offenses which actually evidence corruption or dishonesty."

XXV

Interveners have defined "corruption" to mean a *malum in se* crime traditionally morally wrong as well as illegal of such magnitude as to be a felony and one in which the honesty of the perpetrator is brought into question.

XXVI

Interveners feel that this position is not being put forward by respondents and only the intervention of interveners will protect their interests in this case.

Wherefore, interveners pray judgment of this Court as follows:

1. The right to vote is denied to all felons currently incarcerated or on parole.

2. The right to vote is denied to all felons convicted of Elections Code felonies until pardon is obtained or until a Superior Court restores such right in an Elections Code, Section 350, proceeding.

3. That crimes which are evil in themselves and traditionally morally wrong of such magnitude as to constitute felonies, and wherein the honesty of the perpetrator is brought into question, such as robbery, fraud, burglary, forgery, larceny, extortion, embezzlement, and similar crimes, are infamous within the meaning of the California Constitution and that the moral corruption and dishonesty displayed within such crimes denies the right to vote to those convicted of them, both under the California Constitution and Article 14, Section 2, of the Constitution of the United States.

4. That the right to vote is automaticaly restored to all other felons at the completion of their term of incarceration or parole, whichever comes later.

Duncan M. James
District Attorney
County of Mendocino

Of counsel:
William De Garmo

In the Supreme Court of the State of California

S.F. No. 22916

Abran Ramirez, Larry Gill and Albert Lee, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,
Petitioners,

vs.

Edmund G. Brown, Jr., Secretary of State of the State of California; Ernest Maggini, County Clerk of the County of Monterey County; Mervin Mattos, Registrar of Voters of Stanislaus County; Ruth Warnken, County Clerk of San Luis Obispo County, individually and as representatives of the class of all other County Clerks and Registrars of Voters,
Respondents.

RETURN TO ALTERNATIVE WRIT OF MANDAMUS BY RESPONDENT EDMUND G. BROWN JR., SECRETARY OF STATE

Respondent, Edmund G. Brown Jr., Secretary of State of the State of California, hereby makes his return to the Alternative Writ of Mandamus issued herein and admits, denies, and alleges as follows:

I

Respondent has insufficient information to form a belief as to the matters contained in the following

paragraphs of the Petition for Writ of Mandamus, and based upon such lack of information and belief, therefore, denies the allegations contained therein:

All of Paragraph II
All of Paragraph III
All of Paragraph IV
All of Paragraph V
All of Paragraph VII
All of Paragraph VIII
All of Paragraph IX
All of Paragraph X
The second sentence of Paragraph XXII
The first sentence of Paragraph XXIII
The last sentence of Paragraph XXIV

II

Respondent denies the following allegations of the Petition for Writ of Mandamus:

The second sentence of Paragraph XVIII
The first sentence of Paragraph XXXI
All of Paragraph XXXV
All of Paragraph XXXVI
The last sentence of Paragraph XXXVII

III

Respondent admits the allegations contained in Paragraph VI of the Petition for Writ of Mandamus, in particular the allegation:

"The foregoing petitioners bring this action individually and on behalf of all other persons who are ineligible to register to vote in California solely by reason of a conviction of a felony *other than an election code felony.*" (Emphasis added.)

Wherefore, respondent prays that the Alternative Writ of Mandamus previously issued herein be discharged; that no Peremptory Writ issue; that the Petition be dismissed; for costs of suit; and for such other and further relief as may be proper in the premises.

Dated: September 29, 1972

Respectfully submitted,

Evelle J. Younger
Attorney General

Iver E. Skjeie
Assistant Attorney General

Charles P. Just
Deputy Attorney General

George J. Roth
Deputy Attorney General
By George J. Roth
Deputy Attorney General

Attorneys for Edmund G. Brown Jr.
Secretary of State

In the Supreme Court of the State of California

S.F. No. 22916

Abran Ramirez, Larry Gill and Albert Lee, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Petitioners,

vs.

Edmund G. Brown, Jr., Secretary of State of the State of California; Ernest Maggini, County Clerk of the County of Monterey County; Mervin Mattos, Registrar of Voters of Stanislaus County; Ruth Warnken, County Clerk of San Luis Obispo County, individually and as representatives of the class of all other County Clerks and Registrars of Voters,

Respondents.

RETURN TO ALTERNATIVE WRIT OF MANDAMUS BY RESPONDENT ERNEST MAGGINI, COUNTY CLERK OF THE COUNTY OF MONTEREY

Respondent, Ernest Maggini, County Clerk of the County of Monterey, hereby makes his return to the Alternative Writ of Mandamus herein heretofore issued and states:

That immediately upon receipt of the alternative writ that he commenced to and continues to register to vote all ex-felons whose term of incarceration and

parole have expired and who upon application have demonstrated that they are otherwise fully qualified to vote.

/s/ Ernest Maggini,
County Clerk
County of Monterey
Respondent

/s/ William H. Stoffers,
County Counsel
County of Monterey
Attorney for Respondent

(Letterhead of County Clerk
Courthouse Annex
San Luis Obispo, California - 93401)

September 14, 1972

Hon. G. E. Bishel
Clerk of the Supreme Court
4250 State Building, Civic Center
San Francisco, Calif. 94102

Dear Sir:

Re: Abran Ramirez, et al., vs. Edmund G. Brown, Jr., et al., No. S. F. 22916

Pursuant to the Alternative Writ of Mandate issued on September 12, 1972 in the above action, a copy of which was received by me today, I have instructed all of my deputies, both within the office and out in the field, by a written memorandum this date, that commencing immediately they are to register to vote all ex-felons whose term of incarceration and parole have expired and who are otherwise fully qualified to register to vote in San Luis Obispo County.

I trust that this procedure will be the compliance required by the Alternative Writ.

Very truly yours,
/s/ Ruth Warnken,
County Clerk

rw:w
cc: Robert N. Tait, District Attorney
California Rural Legal Assistance,
San Francisco

Filed September 15, 1972.
G. E. Bishel, Clerk,
Thompson,
S. F. Deputy.

In the Supreme Court of the State of California
In Bank

S. F. No. 22916

Ramirez et al.
v.
Brown, etc.

The motion to intervene by Viola N. Richardson and Duncan M. James is denied. On the court's own motion, Viola N. Richardson is joined as a party respondent to the above-entitled proceeding. The motion to intervene and the supplementary points and authorities in support of that motion may serve as the return to the alternative writ.

/s/ R. L. Sullivan
Acting Chief Justice

Filed Oct. 25, 1972,
G. E. Bishel, Clerk
G. Schnish
S. F. Deputy

DECISION BELOW

The opinion of the Supreme Court of California, reported at *Ramirez v. Brown,* 9 C.3d 199, 507 P.2d 1345, 107 Cal.Rptr. 137 (1973), appears in the Appendix to the Petition for Writ of Certiorari.

Supreme Court of the United States

No. 72-1589 ,

Viola M. Richardson, as County Clerk, etc.,

Petitioner,

v.

Abran Ramirez, et al.

Order allowing certiorari. *Filed* October 9, , *19* 73

The petition herein for a writ of certiorari to the Supreme Court of the State of California *is granted.*

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

DUNCAN M. JAMES,
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Ukiah, California 95482,
Telephone: (707) 462-4731, Ext. 231,
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Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

The petitioner, Viola N. Richardson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the

State of California entered in this proceeding on March 30, 1973.

OPINION BELOW

The opinion of the Supreme Court of California, reported at *Ramirez v. Brown*, 9 C.3d 199, ... P.2d ....., ... Cal.Rptr. ..... (1973), appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of California was entered in bank on March 30, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC, Section 1257(3).

QUESTION PRESENTED

Whether Article II, Section 3, of the California Constitution, which provides that no person "convicted of an infamous crime" shall exercise the privileges of an elector in California, and Article XX, Section 11, of the California Constitution, which denies the right of suffrage to "persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes," and Sections 310, 321, 383, 389, 390, 14240, and 14246 of the California Elections Code, which implement the above constitutional disqualifications, violate the equal protection clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 2:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

California Constitution, Article II, Section 3:

> "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, *person convicted of an infamous crime,* nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." (Emphasis supplied.)

California Constitution, Article XX, Section 11:

> "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage,

persons convicted of bribery, perjury, forgery, malfeasance in office, or *other high crimes.* The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice." (Emphasis supplied.)

California Elections Code:

Sections 310, 321, 383, 389, 390, 14240, and 14246. (Set forth in the appendix hereto.)

California Penal Code:

Sections 1203.4(a), 4852.01, 4852.13, 4852.16, and 4852.17. (Set forth in the appendix hereto.)

STATEMENT OF THE CASE

The respondents, three ex-felons, sought a writ of mandate to compel election officials to register them as voters.[1] The original jurisdiction of the California Supreme Court was properly invoked per *Jolicoeur v. Mihaly,* 5 C.3d 565, 570, footnotes 1 and 2, 488 P.2d 1, 3, 96 Cal.Rptr. 697, 699 (1971). Respondent Ramirez had been convicted in Texas of the felony "robbery by assault" in 1952. In 1972 he applied to register to vote in San Luis Obispo County, California, but was refused registration by the San Luis Obispo County Clerk. Respondent Lee had been convicted of the felony of "possession of heroin" in 1955.

---

[1]Petitioner was joined as a Respondent below upon application. *Ramirez v. Brown, supra,* 9 C.3d 199, 202, and N. 1, ____ P.2d ____, ____ Cal.Rptr. ____ (1973).

In 1972 he applied to register to vote in Monterey County, California, but was refused registration by the Monterey County Clerk. Respondent Gill had been convicted of the felony of "second degree burglary" in 1962 and 1967 and of the felony of "forgery" in 1957. In 1972 he applied to register to vote in Stanislaus County, California, but was refused registration by the Stanislaus County Clerk. *(Ramirez v. Brown, supra,* 9 C.3d 199, 202, ... P.2d ....., Cal.Rptr. ..... (1973); page iii of appendix hereto.)

The California Supreme Court, relying primarily on *Dunn v. Blumstein,* 405 U.S. 330 (1972), held that "disfranchisement by reason of conviction of crime is no longer constitutionally permissible" and, "as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of Article II and Article XX, Section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification, violate the Equal Protection Clause of the Fourteenth Amendment." *(Ramirez v. Brown, supra,* 9 C.3d 199, 202, 216-217, ... P.2d ....., ... Cal. Rptr. ..... (1973), citation omitted, footnote omitted; page xxvii of appendix hereto.)

REASONS FOR GRANTING THE WRIT

I. DISENFRANCHISEMENT OF PERSONS CONVICTED OF CRIME DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The disenfranchisement of ex-felons has been universally approved in the federal courts. The argument that such disenfranchisement constitutes a denial of equal protection has been universally rejected. In *Green v. Board of Elections of the City of New York,* 380 F.2d 445 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968), the court stated that:

> "A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be."
>
> *(Id.,* at 451-452.)

Similarly, in *Beacham v. Braterman,* 300 F.Supp. 182 (S.D. Fla. 1969), aff'd mem., 396 U.S. 11 (1969), it was noted specifically that:

> "The initial question before the court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which affect that exclusion are valid."
>
> *(Id.,* at 183.)

In *Kronlund v. Honstein,* 327 F.Supp. 71 (N.D. Ga. 1971), a Georgia statute disenfranchised those persons convicted of a crime involving moral turpitude. The

statute was attacked by a convicted heroin smuggler, but the court held that:

> " * * * a state may prohibit idiots and insane persons, as well as, those convicted of certain offenses from participating in her elections."
> *(Id.,* at 73.)

Stephens v. Yeomans, 327 F.Supp. 1182 (D. N.J. 1970), did disapprove disenfranchisement based upon a criminal conviction. But the court there based its conclusion upon the inconsistent development of New Jersey voter classification. *(Id.,* at 1188; see *Kronlund v. Honstein, supra,* 327 F.Supp. 71, 73-74.) In contrast, California disenfranchisement provisions are legislatively and judicially consistent. The California Constitution of 1849 provided, in Article II, Section 5, that:

> "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector."

The California Constitution of 1879, in Article II, Section 1, adopted the terms:

> " * * * No idiot, no insane person, no person convicted of any infamous crime * * * ."

By referendum on November 7, 1972 (Proposition 7), the voters of the State of California reenacted Article II, Section 1, of the Constitution of the State of California as Article II, Section 3, as a mandate to the Legislature of this state, requiring the Legislature to provide that no "* * * person convicted of an infamous crime, nor person convicted of embezzlement

or misappropriation of public money, shall exercise the privileges of an elector in this state."

The California Supreme Court defined "infamous" as all felonies in *Ex parte Westenberg,* 167 C. 309, 139 P. 674 (1914), stating:

> "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies, as the punishment therefor is imprisonment in the state prison."
> *(Id.,* at 319, 139 P. at 679.)

In 1966, *Otsuka v. Hite,* 64 C.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284, the Supreme Court explained that a crime may be deemed infamous only by an inquiry focused precisely on the nature of the crime itself rather than solely upon the "nature of the punishment." California disenfranchisement provisions prior to the decision in *Otsuka* thus appeared identical to those of Florida as upheld in *Beacham v. Braterman, supra,* 300 F.Supp. 182 (S.D. Fla. 1969). *Otsuka,* however, did not hold that the California disenfranchisement provisions were no longer applicable to convicted felons. Rather, *Otsuka* gave credence to the second portion of the *Westenberg* definition—"by reason of their nature." Thus, *Otsuka* in no way suggests that the disenfranchisement of felons is not constitutionally permitted. Disenfranchisement is to be based upon the nature of the crime itself and not simply upon the nature of the punishment.

A recent federal case out of the Ninth Circuit has done much to confuse the issue. The court in *Dillenburg v. Kramer,* 469 F.2d 1222 (9th Cir. 1972), fo-

cused its analysis of disenfranchisement of convicted felons upon *Dunn v. Blumstein, supra,* 405 U.S. 330 (1972), as did the California Supreme Court when it decided the case now at bench. In *Dillenburg,* a parolee who had unsuccessfully attempted to have his civil rights restored was denied registration because of the disenfranchisement provisions of the laws of the State of Washington. (See *Dillenburg v. Kramer, supra,* 469 F.2d 1222, 1223, and N. 1.) The Court of Appeals, contra to the determination of the District Court to dismiss the complaint for failure to present a substantial federal question, held that a "substantial federal question" was presented by the issue of disenfranchisement for conviction of crime as a contravention of the Equal Protection Clause of the Fourteenth Amendment and remanded the case to the District Court for further proceedings.[2]

The California Supreme Court, below, held that disenfranchisement of convicted felons was indeed a violation of the Equal Protection Clause. Both courts rely upon the *Dunn* pronouncement that, "to decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental

[2]See *Fincher v. Scott,* 352 F.Supp. 117 (M.D. N.C. 1972), aff'd mem., 41 U.S.L.W. 3594 (U.S. May 7, 1973), discussed *infra.* There, the disenfranchisement laws of North Carolina were unsuccessfully challenged before a three-judge District Court. On appeal, appellees moved to affirm on the ground that the question was so unsubstantial as not to warrant further argument. The judgment was affirmed, however, "Mr. Justice Douglas would note probable jurisdiction and set the cases for oral argument." 41 U.S.L.W. 3594.

interests asserted in support of the classification." *Dunn v. Blumstein, supra,* 405 U.S. 330, ..., 31 L.Ed. 2d 274, 280 (1972).

The *Dunn* court, citing *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), then went on to state that:

> "If a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the court must determine whether the exclusions are necessary to promote a *compelling* state interest' [citations]."
>
> *(Dunn v. Blumstein, supra,* 405 U.S. 330, ..., 31 L.Ed.2d 274, 281 (1972), original emphasis.)

Petitioner submits, however, that both the Ninth Circuit Court of Appeal and the California Supreme Court were in error when they placed reliance upon *Dunn. Dunn v. Blumstein, supra,* dealt with a challenge to state durational residence laws as a ban to the registration of voters. Both *Dillenburg v. Kramer, supra,* and the case now before this Court deal with a challenge to the disenfranchisement of convicted felons, a disenfranchisement *specifically excepted from the equal protection clause by Section 2 of the Fourteenth Amendment.*

A. Section 2 of the Fourteenth Amendment authorized disenfranchisement of convicted felons.

It has been consistently held by this Court that Section 2 of the Fourteenth Amendment permits the states to disenfranchise for crime. In *Davis v. Beason,* 133 U.S. 333 (1890), it is stated that:

"In our judgment [a statute] * * * which provides that 'no person * * * convicted of treason, felony or bribery in this territory * * * is permitted to vote at any election * * * ' is not open to any constitutional or legal objection."

(Id., at 133 U.S. 333, ..., 33 L.Ed. 637, 641.)

In *Trop v. Dulles,* 356 U.S. 86 (1958), this Court stated that:

"A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

(Id., at 96-97. Footnotes omitted.)

And in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), it was stated that:

"Residence requirements, age, previous criminal record [citation] are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters."

(Id., at 51.)

Section 2 of the Fourteenth Amendment provides, in part, that:

" * * * When the right to vote at any election * * * is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way

> abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced * * * ."

Thus, petitioners submit, as Section 2 of the Fourteenth Amendment expressly allows the disenfranchisement of felons without any reduction of representation in the House of Representatives, a general disenfranchisement of convicted felons is allowed.

Petitioner's position is supported by the federal courts. In 1873, in *United States v. Anthony,* 24 Fed. Case No. 14,459, p. 829 (C.C. N.D. N.Y. 1873), the court spoke of disenfranchisement for crime as allowed by Section 2 and noted as follows:

> "This view is assumed in the second section of the Fourteenth Amendment, which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants."
>
> *(Id.,* at 831.)

And in *Green v. Board of Elections of the City of New York, supra,* 380 F.2d 445 (2nd Cir. 1967), it was noted that:

"The framers of the [14th] amendment * * * could hardly have intended the general language of § 1 to outlaw discrimination which § 2 expressly allowed without the penalty of reduced representation. * * * We see nothing in the language or in history to support [the] suggestion that 'other crimes' meant only a crime connected with the rebellion. The court's rejection of Mr. Justice Harlan's position that §2 is the only portion of the Fourteenth Amendment dealing with voting rights, see *Reynolds v. Sims,* supra, 377 U.S. at 589, 84 S.Ct. 1362, 12 L.Ed.2d 506 in no way indicates it would deny that § 1 of the amendment cannot be fairly read to prohibit a discrimination which § 2 expressly permits—especially in the light of the Justices' frequent and consistent statements approving voting disqualification for felony."

(Id., at 452. Footnote omitted.)

In *Kronlund v. Honstein, supra,* 327 F.Supp. 71 (N.D. Ga. 1971), the court found that:

"In determining that there has been a violation of * * * Fourteenth Amendment rights, the exclusionary language of Section 2 of the Fourteenth Amendment must be considered. This court concurs in the opinion expressed on this matter by Judge Friendly in *Green v. Board of Elections of New York,* 380 F.2d 445 (2d Cir. 1967). In that case, it was suggested that the Section 2 language may be dispositive of the question of whether the states can pass disenfranchisement laws. This is so because although Section 2 provides a penalty for denying qualified persons the right to vote, at the same time, it specifically ex-

> cepts from its coverage, state action limiting the right to vote 'for participation in rebellion or other crime.'"
>
> *(Id.,* at 74.)

Any examination of voting rights and denial thereof based upon the Equal Protection Clause of Section 1 of the Fourteenth Amendment must thus take into account the express exceptions of Section 2 of the amendment. Section 1 cannot prohibit what is allowed by Section 2. The latter section speaks of male inhabitants, twenty-one years old, citizens, who have not participated in rebellion "or other crime." It is submitted that, as women's suffrage and the eighteen-year-old vote were provided for by constitutional amendment, only such constitutional amendment can enfranchise aliens, rebels, and felons.

This Court has recently affirmed a decision of the United States District Court for the Middle District of North Carolina which appears to be on-all-fours with the position of the petitioner herein and virtually in direct conflict with the decision of the California Supreme Court below. In *Fincher v. Scott,* 352 F.Supp. 117 (M.D. N.C. 1972), aff'd mem., 41 U.S.L.W. 3594 (U.S. May 7, 1973), a convicted felon was refused registration to vote because he was a convicted felon whose rights of citizenship had not been restored. (See California Penal Code, Sections 1203.4(a), 4852.01, 4852.13, 4852.16, 4852.17 set forth in appendix hereto.) An action was taken before a three-judge district court seeking declaratory and injunctive relief against the applicable statutory and

constitutional provisions of North Carolina depriving convicted felons of the right to vote.[3]

In dismissing the complaint and denying the relief sought, Circuit Judge Craven, speaking for the court, most effectively argues the position of the petitioner herein. He notes:

> "[The North Carolina] provisions are attacked as being a denial of equal protection in violation of U. S. Const. amend. XIV, § 1, * * *.
>
> * * *
>
> "A contention that provisions of state law like those before us violate the equal protection clause also was made in *Green v. Board of Elections*, 380 F2d 445 (2d Cir. 1967).
>
> 'Plaintiff places heaviest weight on the equal protection clause of the Fourteenth Amendment, relied upon in such landmark decisions as the apportionment cases, *Baker v. Carr*, 369 U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663] (1962);

[3] As noted by the court in *Fincher v. Scott*, 352 F.Supp. 117, 118:

> "The Constitution of North Carolina, art. VI, § 2(3) provides:
>
> "'*Disqualification of felon:* No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to rights of citizenship in the manner prescribed by law.'
>
> "N.C.Gen.Stat. § 163-55(3) provides:
>
> "'The following classes of persons shall not be allowed to register or vote in this State:
>
> . . . . . .
>
> "'(3) Persons who have been convicted, or who have confessed their guilt in open court, upon indictment, of any crime the punishment for which now or may hereafter be imprisonment in the State's prison, unless he shall have had his rights of citizenship restored in the manner prescribed by law.'"

Gray v. Sanders, 372 U.S. 368 [83 S.Ct. 801, 9 L.Ed.2d 821] (1963), and *Reynolds v. Sims,* 377 U.S. 533 [84 S.Ct. 1362, 12 L.Ed.2d 506] (1964); and the voter qualification cases, *Carrington v. Rash,* 380 U.S. 89 [85 S.Ct. 775, 13 L.Ed.2d 675] (1965) and *Harper v. Virginia Board of Elections,* 383 U.S. 663 [86 S.Ct. 1079, 16 L.Ed.2d 169] (1966). But none of those decisions intimates that the states are without power to continue their historic exclusion from the franchise of persons convicted of all or certain types of felonies. Even though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized —indeed put forward by the Justices to illustrate what the states may properly do—that such expressions cannot be dismissed as unconsidered dicta.' 380 F.2d at 451.

"We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause. * * * *"

* * *

" * * * Putting it positively, we think § 1 must be read in light of § 2, and, so read, denial of the franchise to felons is specifically excepted from the Equal Protection Clause contained in § 1.

"While it may be more desirable from a correctional point of view to give felons the right to vote, Comment, 50 N.C.L. Rev. 903, 909-10 (1972), we are convinced the states are not constitutionally required to do so."

Fincher v. Scott, supra, 352 F.Supp. 117, 118-119 (M.D. N.C. 1972).

The correctness of the decision below is thus open to serious question. The California Supreme Court has held unconstitutional, on the basis of the Equal Protection Clause of the Fourteenth Amendment, Section 1, various California constitutional and statutory provisions relating to disenfranchisement for crime without due regard for the declaration of Section 2 of that amendment which excepts such disenfranchisement from the purview of the Equal Protection Clause. The California Supreme Court is in conflict with the United States District Court for the Middle District of North Carolina and has decided a substantive federal question in a way not in accord with the decisions of this and other federal courts. These conflicts justify the exercise of this Court's discretion to issue a writ of certiorari to review the judgment below.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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Dated: May 18, 1973.

(Appendix Follows)

Appendix

In the Supreme Court
of the
State of California

In Bank

S.F. No. 22916

Abran Ramirez et al.,
Petitioners,
vs.
Edmund G. Brown, Jr., as Secretary of State, etc., et al.,
Respondents.

[Filed Mar. 30, 1973]

Opinion

This is a proceeding for writ of mandate brought by three ex-felons to compel respondent election officials to register them as voters. The case calls into question once again the constitutionality of provisions of California law excluding from the franchise all persons who have been convicted of an "infamous crime." We addressed ourselves to this problem seven years ago in Otsuka v. Hite (1966) 64 Cal.2d 596. Petitioners now ask us to consider the matter further

in the light of significant intervening developments in the law of equal protection. As will appear, we conclude that under present standards disfranchisement by reason of conviction of crime is no longer constitutionally permissible.

Petitioner Ramirez is a 43-year-old farmworker, married, with five children. Twenty-one years ago he was convicted in Texas of a felony entitled "robbery by assault." He avers that the offense arose out of an argument in a restaurant, and that at the trial he was without counsel and pleaded guilty on the advice of the judge. After serving only three months in jail he was released on parole. His parole successfully terminated 11 years ago.

In February 1972 petitioner applied to register to vote in San Luis Obispo County. He was refused registration by respondent San Luis Obispo County Clerk on the sole ground that he had been convicted of a felony and had spent some time in incarceration.

Petitioner Lee, a resident of Salinas, is 54 years old, married, with four children. Eighteen years ago he was convicted of the felony of possession of heroin. After serving two years in prison he was released on parole. His parole successfully terminated 14 years ago.

In March 1972 petitioner applied to register to vote in Monterey County. He was refused registration by respondent Monterey County Clerk on the sole ground that he had been convicted of a felony and had not obtained a pardon from the Governor.

Petitioner Gill is a 45-year-old winery worker, married, with four children. He was convicted in 1952 and 1967 of second degree burglary, and in 1957 of forgery. He avers that his offenses arose out of efforts to obtain money to support a narcotics addiction. On each conviction he served some time in prison, followed by a successful parole.

In April 1972 petitioner applied to register to vote in Stanislaus County. He was refused registration by respondent Stanislaus County Clerk on the sole ground of his prior felony convictions.[1]

Petitioners invoke the original jurisdiction of this court, and seek relief by writ of mandate. For the reasons stated in Jolicoeur v. Mihaly (1971) 5 Cal.3d 565, 570, footnotes 1 and 2, the case falls within the limited category in which we deem it proper to exercise original jurisdiction, and the prayer is for the appropriate remedy. (Accord, Young v. Gnoss (1972) 7 Cal.3d 18, 21; Wenke v. Hitchcock (1972) 6 Cal.3d 746, 750-751.)

Our alternative writ of mandate directed that respondents "register to vote all ex-felons whose term[s] of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote," or show cause why this should not be done. The clerks of San Luis Obispo, Mon-

[1]The remaining petitioners are the League of Women Voters and three nonprofit organizations which support the interests of ex-convicts. The Secretary of State is named as a respondent in his capacity of chief elections officer of California. Upon application we ordered the Mendocino County Clerk joined as an additional party respondent.

terey and Stanislaus counties decided not to contest the issue and advised the court they will hereafter register all such ex-felons who apply, presumably including the present petitioners. It does not follow, however, that this proceeding should be dismissed as moot. The acquiescence of the three named county clerks is in no way binding on election officials of the 55 other counties of California in which the petitioners might choose to reside. Moreover, it is undisputed that in many of those other counties there are ex-felons among the resident population who have been or would be refused registration on the precise ground here challenged.[2] The case thus poses a question which is of broad public interest, is likely to recur, and should receive uniform resolution throughout the state. In such circumstances we deem it appropriate to exercise our inherent discretion to resolve the issue, "even though an event occurring during its pendency would normally render the matter moot." (In re William M. (1970) 3 Cal.3d 16, 23; accord, Liberty Mutual Ins. Co. v. Fales (1973) 8 Cal.3d 712, 715-716, and cases cited; see also Roe v. Wade (1973) ___ U.S. ___, ___, 41 U.S.L.Week 4213, 4217.) This

[2]Exact figures are difficult to obtain. Obviously almost every person convicted of felony and sentenced to prison sooner or later becomes an "ex-felon," and petitioners estimate there are 100,000 such persons in California today. Only those who wish to vote and who live in counties which refuse to register them, of course, are relevant here. Nevertheless we may fairly infer that their number is not insignificant, in view of (1) a recent survey of county election practices conducted by the Secretary of State, disclosing a wide variety of crimes which have been deemed to disqualify ex-felon applicants from voting, and (2) the strong likelihood that additional ex-felons have been discouraged by these laws and practices from even applying to register.

rule is particularly applicable to challenges to the validity of election laws. (See, e.g., Zeilenga v. Nelson (1971) 4 Cal.3d 716, 719-720; see also Goosby v. Osser (1973) ____ U.S. ____, ____, 41 U.S.L.Week 4167, 4168, fn. 2.)

One further preliminary point requires discussion. At the time petitioners were refused registration, respondents' constitutional authority was former article II, section 1, of the California Constitution, which provided in part that "no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State. . . ." By the passage of Proposition 7 at the November 7, 1972, general election the people repealed this language and substituted therefor the following new article II, section 3: "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." We consider the effect, if any, of this amendment.

It is first apparent that whereas the former section itself prohibited all persons convicted of an "infamous crime" from voting, the new section de-

clares that "The Legislature shall provide" for that result. We apprehend no difference in substance. As we explained in *Otsuka* (64 Cal.2d at pp. 607-608), since its first session the Legislature has often undertaken to implement the voting disqualifications of the Constitution, and the present Elections Code contains a number of statutes bearing on the exclusion of ex-felons from the franchise.[3] Petitioners candidly concede that the passage of Proposition 7 cannot reasonably be construed as an implied repeal of all such provisions, wiping the statute books clean for future legislation on the same subject. Repeals by implication are not favored (Warne v. Harkness (1963) 60 Cal.2d 579, 587-588), and at no time in the progress of Proposition 7 through the Legislature or during its presentation to the voters was there the slightest indication it was intended to have so drastic a result. It follows that the addition of the words, "The Legislature shall provide," must be interpreted merely as an express recognition of the legislative authority which has in fact been exercised since the earliest days of our state government. And in so specifying, new article II conforms its language with that of

[3]Sections 310 and 321 provide that the affidavit of registration shall show whether the affiant has been convicted of "a felony which disqualifies him from voting." Sections 383, 389, and 390 direct the county clerk to cancel the registration of all voters who have been convicted of "any infamous crime or of the embezzlement or misappropriation of any public money." Sections 14240 and 14246 permit a voter's qualifications to be challenged on the ground that he has been convicted of "a felony" or of "the embezzlement or misappropriation of public money."

article XX, section 11, which has provided since its adoption in 1879 that "Laws shall be made" to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, "or other high crimes." (See also Const. of 1849, art. XI, § 18.)

The second relevant change in wording brought about by the adoption of new article II, section 3, is the deletion of the word "ever" from the provision of former article II, section 1, that no person convicted of an infamous crime "shall ever exercise the privileges of an elector in this State." Again we perceive no change in legal effect. Even under the prior language a person denied the right to vote by reason of conviction of crime did not in actuality remain "forever" disfranchised: as we pointed out in *Otsuka* (at p. 604 of 64 Cal.2d), the Legislature has expressly provided for restoration of the right to vote to such persons "either by court order after completion of probation (Pen. Code, § 1203.4) or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings (Pen. Code, §§ 4852.01-4852.17)." And no such legislation was necessary, of course, to restore the right to vote to a previously insane person who recovered his sanity, or to a former illiterate who achieved literacy. Accordingly, the sole possible meaning of the word "ever" as used in former article II, section 1, was that "at no time in the future" would a person under constitutional disqualification from voting be allowed to vote. Thus the word was merely emphatic surplusage, and with its deletion the Constitution reverted in this respect

to the simpler language of the first such provision in California law.[4]

We conclude that under both the present and former article II of our Constitution, the controlling issue is whether the disfranchisement of all persons who have been convicted of crime violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

When this issue was presented to us in Otsuka v. Hite (1966) supra, 64 Cal.2d 596, we resolved it by invoking the then current rules for applying the equal protection clause to a restriction on a fundamental interest such as the franchise. We began by identifying the "compelling state interest" served by denying ex-felons the right to vote. *(Id.* at pp. 602-603.) That interest, we determined, was "to protect 'the purity of the ballot box' against abuses by morally corrupt and dishonest voters operating to the detriment of the electorate as a whole" *(id.* at p. 611)—in short, to deter election fraud.

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[4]Article II, section 5, of the Constitution of 1849 declared that "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector."

There is no merit in petitioners' argument that deletion of the word "ever" signifies that a person convicted of crime is hereafter disenfranchised only so long as he is on probation or is serving his sentence. In drafting the amendments which eventually became new article II, the California Law Revision Commission proposed express language to limit disenfranchisement to that period. (Cal. Const. Revision Com., Proposed Revision of the Cal. Constitution (1970) pt. 2, p. 18.) The Legislature, however, declined to adopt the change when it submitted Proposition 7 to the voters.

We then turned to the second branch of the prevailing equal protection test, namely, an inquiry into whether the restriction was "drawn with sufficient specificity." (*Id.* at p. 603.) At the time of *Otsuka*, however, the contours of that requirement had not been clearly delineated by the United States Supreme Court. The most recent authority then was Harper v. Virginia Board of Elections (1966) 383 U.S. 663, filed just 60 days before *Otsuka*. In holding that a state poll tax violated the equal protection clause, the high court reasoned (at p. 666) that "Voter qualifications have *no relation* to wealth nor to paying or not paying this or any other tax." (Italics added; fn. omitted.)[5] Hence it was still generally believed that the requirement of specificity was satisfied if the court could find a "reasonable relationship" between the restriction and the articulated state interest.

Our analysis in *Otsuka* followed the traditional path. We began (at p. 603) by quoting McLaughlin v. Florida (1964) 379 U.S. 184, 191, for the proposition that "The courts must reach and determine the question whether the classifications drawn in a statute are *reasonable* in light of its purpose." (Italics added.) We then demonstrated the "unreasonableness" of a classification which disfranchises all ex-felons without distinction: raising the possibility of

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[5]It was only several years later and with the advantages of hindsight that we were able to view *Harper* as a transitional decision, the "implication" of which was that "more than 'rationality' must be demanded of state voter qualifications." (Castro v. State of California (1970) 2 Cal.3d 223, 235.)

citizens losing the right to vote upon conviction of felonies of a comparatively minor nature, we cited *Harper* for the conclusion that "No *reasonable relation* is apparent between this result and the purpose of protecting the integrity of the elective process." (Italics added.) Such malum prohibitum conduct, we reiterated, may be "totally *unrelated* to the goal of preservation of the integrity of the elective process." (Italics added; fn. omitted.) (*Id.* at p. 606.)

Accordingly, in order to save the constitutionality of article II we held that it could be permitted to disfranchise only those voters who had been convicted of a certain limited class of offenses which we defined as follows (at p. 611): "the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it *may reasonably be deemed* to constitute a threat to the integrity of the elective process." (Italics added; fn. omitted.) Finding no such threat in the fact that the plaintiffs in *Otsuka* had been convicted 20 years earlier of refusing to serve in the armed forces because of conscientious objections, we reversed a judgment upholding a refusal to register them as voters.

In the seven years since *Otsuka*, however, the test for judging the constitutionality of a state-imposed limitation on the right to vote has become substantially more strict. At least since 1969 it is not enough that there be a rational relation between the restriction and the compelling state interest; the restriction is now constitutionally permissible only if it is "neces-

sary" to promote that interest, and to be "necessary" it must constitute, inter alia, the "least burdensome" alternative possible. We proceed to document this evolution of the law.

In Kramer v. Union School District (1969) 395 U.S. 621, the United States Supreme Court was called upon to review the constitutionality of a New York statute which excluded from voting in school district elections persons who neither owned nor leased real property in the district, or who were not parents of children in the local schools. The court set forth the controlling test in the following language (at pp. 626-627): "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a compelling state interest." (Italics added.)

The school authorities contended they had a compelling interest in limiting the right to vote in school district elections to persons "primarily interested in school affairs." The high court assumed arguendo that the claimed concern was legitimate, but emphasized (at p. 632) that the classifications resulting from the statute must nevertheless "be tailored so that the exclusion of appellant [a nonparent neither owning nor leasing real property in the district] and members of his class is *necessary* to achieve the articulated state goal." (Italics added; fn. omitted.) Invalidating the statute, the court held the classifications were not "necessary" in the sense that they were

both overinclusive and underinclusive.[6] (Accord, Cipriano v. City of Houma (1969) 395 U.S. 701; Turner v. Fouche (1970) 396 U.S. 346; Evans v. Kornman (1970) 398 U.S. 419; Phoenix v. Kolodziejski (1970) 399 U.S. 204.)

In two cases decided last term the United States Supreme Court struck down state-imposed restrictions on the franchise on the ground they were not "necessary" in yet another sense, i.e., they were not the least burdensome means available of achieving the articulated state interest. First, in Bullock v. Carter (1972) 405 U.S. 134, the court unanimously invalidated a Texas statutory scheme whereby certain candidates for public office were required to pay substantial filing fees for the right to run in primary elections. The court recognized that the state has a legitimate interest in regulating the number of candidates on the ballot and in protecting "the integrity of its political processes from frivolous or fraudulent candidacies." (*Id.* at p. 145.) The court also conceded that large filing fees will tend in fact to limit the number of candidates on the ballot, and "There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy" (*id.* at pp. 145-146). Nevertheless the court ruled (at p. 146) not only that the filing fee require-

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[6] "The classifications in [the New York statute] permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions." (Fn. omitted.) (*Id.* at p. 632.)

ment was both underinclusive and overinclusive, but also that "other means to protect those valid interests are available." The court did not articulate the "other means" intended, but we infer from its reliance on Jenness v. Fortson (1971) 403 U.S. 431, that such means at least include the use of nominating petitions signed by a prescribed percentage of registered voters.

Even more in point is Dunn v. Blumstein (1972) 405 U.S. 330, decided a month after *Bullock*. At issue in *Dunn* was the constitutionality of the requirements of Tennessee law that a voter be a resident of the state for one year and of the county for 90 days in order to exercise the suffrage. The high court reiterated the strict equal protection test of *Kramer (id.* at p. 342), and emphasized in particular that "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' [citations] and must be 'tailored' to serve their legitimate objectives. [Citation.] And if there are *other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity,* a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" (Italics added.) *(Id.* at p. 343.)

Tennessee first contended it had a compelling interest in "preserving the purity of the ballot box." The high court apparently found this phraseology some-

what overblown, calling it a "formidable sounding" state interest. (*Id.* at p. 345.) But the court then conceded that when the purpose of the statutory scheme is narrowed down to prevention of election fraud by nonresidents' falsely swearing they are eligible to vote, it does constitute a legitimate governmental goal. Nevertheless, the court held that durational residence requirements were not "necessary" to achieve that goal because two less burdensome means of doing so were available.

First, the court stressed that early abuses have been eliminated by the development of elaborate procedural safeguards governing election practices: "Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States, this purpose is served by a system of voter registration. [Citations.] Given this system, the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide residents." (Fn. omitted.) (*Id.* at p. 346.)

Second, the court gave full weight to the fact that election fraud in Tennessee is also punishable as a crime: "Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared." (Fn. omitted.) (*Id.* at p. 353.) After reviewing a half-dozen Tennessee statutes defining "offenses to deal with voter fraud," the court

concluded (at pp. 353-354): "Where a State has available such remedial action to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud." (See also United States v. State of Texas (W.D.Tex. 1966) 252 F.Supp. 234, 251, fn. 71, motion to affirm granted without opinion, 384 U.S. 155.)[7]

This constitutional evolution finds its parallel in the decisions of our court since *Otsuka*. To begin with, in Castro v. State of California (1970) supra, 2 Cal. 3d 223, 235, we explicitly recognized for the first time that in *Kramer* the United States Supreme Court "announced the new constitutional standard" discussed above. Applying that standard, we reviewed a requirement in the very constitutional provision here in issue—former article II, section 1—that voters be literate in the English language. We began by identifying a compelling state interest served by that requirement, namely, "California's concern that those of her citizens who are eligible to vote likewise be capable of informed decisions on matters submitted to the electorate" (*id.* at p. 237). But the remainder of our opinion was devoted to showing that literacy

[7]As an additional compelling state interest, Tennessee urged that long-time residents are more likely to vote intelligently because they are more informed about local issues. Without deciding whether this is a legitimate state concern, the court ruled that durational residence requirements are both underinclusive and overinclusive for this purpose, and concluded: "Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." (*Id.* at p. 360.)

in English is not "necessary" to promote that concern because of the existence of a reasonable alternative, i.e., access by persons literate in Spanish to spoken or printed sources of political information in the Spanish language comparable to those available in English. (*Id.* at pp. 238-242.) As to such persons, we concluded, the English literacy requirement could not constitutionally be applied.[8]

In a group of cases after *Castro* not involving the exercise of the franchise but challenging statutes affecting other fundamental rights or based on suspect classifications, we likewise held that a restriction which is not the least burdensome available is not "necessary" to promote any state interest.[9] In In re Antazo (1970) 3 Cal.3d 100, we assumed arguendo that imprisonment of indigent defendants sentenced to pay a fine served the state's claimed purposes of collecting such fines and rehabilitating the offenders. We concluded, however, that imprisonment was not "necessary" to promote either purpose because the state has available to it alternative and less burdensome means of enforcing payment of fines. (*Id.* at pp. 114-115.)

Again, in Zeilenga v. Nelson (1971) supra, 4 Cal.3d 716, Camara v. Mellon (1971) 4 Cal.3d 714, and

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[8]Although vacated on other grounds (403 U.S. 915), our decision in Westbrook v.Mihaly (1970) 2 Cal.3d 765, 788-795, adopted a similar analysis in invalidating the requirement of two-thirds approval of those voting for passage of local general obligation bond issues.

[9]In two additional decisions we found no compelling state interest whatever, and therefore did not reach the question of necessity. (Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288, 301; In re Gary W. (1971) 5 Cal.3d 296, 308.)

Thompson v. Mellon (1973) ..... Cal.3d ....., we held that residence requirements of five, three, and two years respectively for candidacy for public office were not necessary to insure that the candidate was knowledgeable about local conditions, because such requirements were not the "least restrictive method" of doing so. (*Id.* at p. 723.) In Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, we ruled that the prohibition against women bartenders was not necessary to prevent improprieties in the sale of alcoholic beverages because that evil "can be directly prevented through nondiscriminatory legislation" such as general regulatory and penal statutes. (*Id.* at pp. 20-21.) And in Serrano v. Priest (1971) 5 Cal.3d 584, we declared that California's school financing system was not "necessary" to promote either of the two compelling interests asserted, i.e., administrative and fiscal control over the schools at the local level. (*Id*, at pp. 610-611.)

Finally, we applied this test in a recent voting rights case. The issue in Young v. Gnoss (1972) supra, 7 Cal.3d 18, was the constitutionality of the requirements of California law that a voter be a resident of the county for 90 days and of the precinct for 54 days in order to exercise the suffrage. After rejecting certain claimed justifications for these durational residence requirements as insufficiently compelling (*id.* at pp. 24-26), we considered the asserted need to furnish local election officers with affidavits of registration and indexes of registered voters so as to permit identification of prospective voters. The timely

delivery of such documents, we said, is "essential to the conduct of the election, and constitutes a compelling governmental interest. But the question remains whether the closing of registration 54 days before the election is *necessary* to achieve that goal." (Italics added.) (*Id.* at p. 26.)

We found no such necessity. Instead, we emphasized that alternate means were available to solve the problem of a last-minute influx of registrations, e.g., by delivering the affidavit books and voter indexes in two cycles rather than one. (See also Stats. 1972, ch. 1356.) We therefore concluded (at pp. 26-27) that to cut off all registration 54 days before the election in order to promote this governmental purpose "is *not* the method which is the least burdensome on the exercise of the right of suffrage within the meaning of *Dunn*." (Italics in original.)

In the light of this evolution of the law of equal protection, the analysis in *Otsuka* of the constitutionality of disfranchising persons convicted of crime appears no longer adequate.[10] For present purposes we may adhere to the determination in *Otsuka* that the purpose of that disfranchisement is to deter election fraud; but we must now also consider whether so

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[10]For the same reason, three federal cases on disfranchisement of ex-felons are no longer persuasive. (Green v. Board of Elections of City of New York (2d Cir. 1967) 380 F.2d 445; Kronlund v. Honstein (N.D. Ga. 1971) 327 F.Supp. 71; Beacham v. Braterman (S.D. Fla. 1969) 300 F.Supp. 182, motion to affirm granted without opinion, 396 U.S. 12.) Later federal decisions have appropriately distinguished these precedents. (Dillenburg v. Kramer (9th Cir. 1972) 469 F.2d 1222, 1225-1226; Stephens v. Yeomans (D.N.J. 1970) 327 F.Supp. 1182, 1185-1187.)

drastic a remedy is "necessary in the sense that it is the least burdensome means available to achieve that goal." (Young v. Gnoss (1972) supra, 7 Cal.3d 18, 22.) We shall find the answer to our inquiry, as did the United States Supreme Court in *Dunn*, by examining the state's "total statutory scheme for regulating the franchise." (405 U.S. at p. 346.)

In the early years of California political history, that scheme was rudimentary at best. The first act to regulate elections (Stats. 1850, ch. 38, p. 101) included only a handful of sections governing the casting and counting of votes. The statute declared that "The voting shall be by ballot" (§24), but made no provision for furnishing official ballots printed by the state and uniform in appearance and content. Instead, each voter brought his own ballot or "ticket" to the polls, consisting of a piece of paper on which he had written—or, more commonly, a political party or candidate had printed—his choices for the various offices.[11]

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[11]"The tickets were merely long, narrow slips of paper, headed by a vignette, on which were printed the names of a party's candidates for each office. They were given out to the faithful on election day by party ticket peddlers who stationed themselves on the streets and corners around the polls. This system was frequently abused. In some of the more partisan wards a voter could search blocks and blocks before finding a consentient ticket peddler. Even with ticket in hand the elector had to maintain his vigilance, for it was not uncommon for contending factions or parties to counterfeit their opponents' tickets substituting one or two of their own for the names listed on the regular ticket. Under these circumstances, if the elector was not wary, he might then vote for a couple of opposition candidates, while under the impression he was casting a straight party ticket." (Petersen, *The Struggle for the Australian Ballot in California* (1972) 51 Cal. Hist. Q. 227-228; see also Kirk v. Rhoads (1873) 46 Cal. 398, 406.)

Although challenges were permitted (§§ 27-31), no voter was required to register, and the ballots were obviously not numbered. The statute simply provided (§ 25) that "Whenever any person offers to vote, the Inspector shall pronounce his name in an audible voice, and if there be no objection to the qualification of such person as an elector, shall receive his ballot, and in the presence of the other Judges put the same, without being opened or examined, into the ballot box." The system thus made it possible for unqualified persons such as nonresidents or aliens to vote, and for a voter in a single election to cast a ballot more than one time or at more than one polling place. Moreover, "Because the ballot box usually stood in the center of a public room, secret voting was difficult and manipulation relatively easy." (Petersen, *op. cit.* supra, p. 229.)[12]

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[12]A contemporary eyewitness account of an early California election describes as follows a not uncommon method of manipulating available aliens: "The various candidates, for example, would round up these prospective voters like so many cattle, confine them in corrals (usually in the neighborhood of Boyle Heights), keep them in a truly magnificent state of intoxication until the eventful morning, and then put them in stages hired from either Banning or Tomlinson for the purpose; and from the time the temporary prisoners left the corral until their votes had been securely deposited, they were closely watched by guards. On reaching the voting place, the captives were unloaded from the stage like so much inanimate baggage, and turned over to friends of the candidate to whom, so to speak, for the time being they belonged. One at a time, these creatures were led to vote; and as each staggered to the ballot-box, a ticket was held up and he was made to deposit it. Once having served the purpose, he was turned loose and remained free until another election unless, as I have intimated, he and his fellows were again corralled and made to vote a second or even a third time the same day." (Newmark, Sixty Years in Southern California (4th ed. 1970) p. 42.)

Finally, "The problem was compounded because the dominant political faction in a precinct, ward, or county, usually controlled the appointment of election officials. Therefore, even if the voting was conducted by the rules, it was uncertain whether the ballots would be honestly tabulated." (Petersen, *op. cit.* supra, p. 229.) Little assurance could be gained from the statute, which provided only that after closing the polls the election officials were to open the ballot box, count the ballots, and send the totals to the county clerk either by mail or "by private hand." (§§ 33-36.)

In such circumstances the disfranchisement of persons convicted of an "infamous crime" (§ 12) may well have been necessary to minimize the more egregious frauds practiced on the electorate by unscrupulous candidates or voters. But the law on this subject has not remained static. In the ensuing century there have been numerous movements for electoral reform, resulting in a complex series of amendments to the voting laws. To cite only the major legislative efforts to curb election fraud, we note that in 1866 the first voter registration act was adopted. (Stats. 1865-1866, ch. 265, p. 288.) In 1872 the new Political Code required that every ballot "be of paper uniform in size, color, weight, texture, and appearance" (§ 1187), specified in detail the size and content of the ballot (§ 1191), and directed the Secretary of State to procure and sell such paper to the public (§§ 1188-1189). The code also contained elaborate provisions designed to promote secrecy in voting by forbidding that a

ballot be marked on the outside or folded in any manner intended to indicate its contents. (§§ 1196-1199, 1206-1207.)

Voting secrecy was assured, however, by the adoption of the Australian ballot two decades later. (Stats. 1891, ch. 130, p. 165.) Under this legislation all ballots were furnished at public expense (§ 1, on paper bearing an undisclosed watermark (§ 12), consecutively numbered with a corresponding stub (§ 13), and printed with the names of the duly nominated candidates in alphabetical order *(ibid.)*. In addition, private booths were provided for the actual marking of the ballots (§ 19); each voter received his ballot directly from the election official at the polls (§ 20); and in marking his ballot each voter was required to use a stamp and ink pad furnished in the voting booth (§ 21).

After several false starts, the Legislature has also taken advantage of various technological developments in the election process. Each such development, of course, has tended to make it more difficult for dishonest individuals to tamper with either the casting or the counting of the ballots. Thus in 1903 the use of voting machines was authorized, permitting mechanical tabulation of results. (Stats. 1903, ch. 226, p. 262; see also Stats. 1923, ch. 96, p. 182.) In 1949 the Legislature provided for punch-card voting and electromechanical tabulation. (Stats. 1949, ch. 41, p. 57.) And in 1953 it authorized the marking of ballots by specially prepared pencils, with consequent electronic tabulation of the vote. (Stats. 1953, ch. 1046, p. 2514.)

Taken together, these and other reforms of the past hundred years have radically diminished the possibility of election fraud in California. The voting and counting process is now thoroughly hemmed in by control mechanisms at every stage, so that deliberate irregularities, "if present today, are rare and have negligible effects on election results." (Note (1967) 14 U.C.L.A. L.Rev. 699, 702 (reporting that the Los Angeles County Registrar of Voters had received no complaints of this type for the previous 41 years).) In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the co-ordinated skills of a vast squadron of computer technicians.[13]

Turning to the second point emphasized in *Dunn*—the range of penal sanctions available to prevent election fraud—we observe a similar development. The California Constitution has directed since its inception that the right to vote shall be supported by laws not only regulating elections but also "prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice." (Const. of 1849, art. XI, § 18; Const. of 1879, art. XX, § 11; new art. II, § 3, eff. Nov. 8, 1972.) The response of the Legislature to this

[13]The Legislature itself has recognized the contemporary irrelevance of the availability of liquor to election results by repealing its long-standing ban on the sale of alcoholic beverages during polling hours. (Former Bus. & Prof. Code, § 25630, repealed by Stats. 1969, ch. 614, p. 1253.)

directive has grown dramatically over the years. The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, ch. 38, pp. 110-111, §§ 98-105.) Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors.[14] Among this plethora of offenses we take particular note, in the present connection, of the felony sanctions against fraudulent registrations (§ 220), buying and selling of votes (§§ 12000-12008),[15]

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[14]We noted some of these sanctions in *Otsuka* (64 Cal.2d at p. 603, fn. 3), but of course did not view them in the light thereafter cast on the issue by *Dunn*.

[15]Certain of these provisions are especially elaborate:

Section 12000: "A person shall not directly or through any other person receive, agree, or contract for, before or during an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person for either:

"(a) Voting or agreeing to vote.

"(b) Coming or agreeing to come to the polls.

"(c) Refraining or agreeing to refrain from voting.

"(d) Voting or agreeing to vote for any particular person.

"(e) Refraining or agreeing to refrain from voting for any particular person."

Section 12001: "A person shall not directly or through any other person receive any money or other valuable thing, during or after an election, because he or any other person:

"(a) Voted or refrained from voting for any particular person.

"(b) Came to the polls or remained away from the polls.

"(c) Induced any other person to:

"(1) Vote or refrain from voting.

"(2) Vote or refrain from voting for any particular person.

"(3) Come to or remain away from the polls."

Section 12003: "A person shall not directly or through any other person pay, lend, or contribute, or offer or promise to pay,

intimidating voters by threat or bribery (§§ 29130-29135), voting twice, or fraudulently voting without being entitled to do so, or impersonating another voter (§§ 14403, 29430-29431), fraud or forgery in casting absentee ballots (§§ 14690-14692), tampering with voting machines (§ 15280) or ballot boxes (§§ 17090-17092), forging or altering election returns (§§ 29100-29103), and so interfering "with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted" (§ 17093).[16] These sanctions are even more pervasive than those characterized by the Supreme Court in *Dunn* as "more than adequate to detect and

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lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:

"(a) Induce the voter to:

"(1) Vote or refrain from voting at any election.

"(2) Vote or refrain from voting at an election for any particular person.

"(3) Come to the polls at an election.

"(4) Remain away from the polls at an election.

"(b) Reward the voter for having:

"(1) Voted.

"(2) Refrained from voting.

"(3) Voted for any particular person.

"(4) Refrained from voting for any particular person.

"(5) Come to the polls at an election.

"(6) Remained away from the polls at an election."

Each of these offenses is punishable by an indeterminate prison term of one to seven years. (§ 12012.)

[16]In addition, the code contains a great many directives of all kinds to the various participants in the election process, and declares generally that "Every person who willfully violates *any* of the provisions of the laws of this State relating to election is, unless a different punishment is prescribed by this code, punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the state prison not exceeding five years, or by both." (Italics added.) (§ 29001; see also § 29002.)

deter whatever fraud may be feared." (405 U.S. at p. 353.)

In holding that a challenge to state laws identical to those here in issue required the convening of a three-judge federal court, the Ninth Circuit Court of Appeals reasoned: "Earlier in our constitutional history, laws disenfranchising persons convicted of crime may have been immune from attack. But constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber. 'Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.' (Harper v. Virginia Board of Elections (1966) 383 U.S. 663, 669, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169.) In the wake of the many decisions dismantling restrictions on voting rights, we cannot say that this challenge to Washington laws is now unsubstantial." (Dillenburg v. Kramer (1972) supra, 469 F.2d 1222, 1226.)[17]

The same challenge to California's laws on this topic is not only substantial, it is meritorious. For the reasons stated in *Dunn,* we hold that the enforcement of modern statutes regulating the voting process and penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is the least burdensome on the right of suffrage. It follows that such disfranchisement is not "necessary,"

[17]Similarly, the United States Supreme Court recently ruled that a substantial constitutional issue was presented by an attack on a Pennsylvania statute which prohibits from voting all persons confined in penal institutions awaiting trial. (Goosby v. Osser (1973) supra, ___ U.S. ___, 41 U.S.L.Week 4167.)

within the meaning of *Dunn* and its predecessors, to achieve that goal. We conclude that, as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification *(ante,* fn. 3), violate the equal protection clause of the Fourteenth Amendment.[18]

The alternative writ, having served its purpose, is discharged, and the petition for peremptory writ is denied. All parties shall recover their costs from the State of California. (See Code Civ. Proc., § 1095.)

Mosk, J.

We Concur:

Wright, C.J.
McComb, J.
Tobriner, J.
Burke, J.
Sullivan, J.
*Taylor, J.

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[18]Respondent Secretary of State asks us to reaffirm the constitutionality of statutes which deny the suffrage to all felons who are currently incarcerated or on parole. (Pen. Code, §§ 2600, 3054.) The question whether the disfranchisement of such persons is today constitutionally permissible is not presented in the case at bar. The individual petitioners herein have all been discharged from prison and have successfully completed their parole; the prayer of the petition requests only that respondents be directed to register ex-felons whose terms of incarceration and parole have expired, and our alternative writ was so limited.

*Assigned by the Chairman of the Judicial Council.

§ 310. Affidavit of registration; contents

The affidavit of registration shall show:

(a) The facts necessary to establish the affiant as an elector.

(b) Affiant's name at length, including his given name, and a middle name or initial, or if the initial of his given name is customarily used, then the initial and middle name. The given name of a woman shall be preceded in all cases by the designation of Miss or Mrs.

(c) Affiant's place of residence and post-office address with sufficient particularity to identify it and to determine affiant's voting precinct.

(d) Affiant's occupation.

(e) The country or state of affiant's birth.

(f) If foreign born, how citizenship was acquired, whether by:

(1) Citizenship of father.

(2) Treaty or act of Congress.

(3) Order of a court of naturalization.

(4) Marriage to a citizen.

(5) Naturalization of a parent or husband.

The date or year when and the place where the affiant became a citizen shall be stated except in the case of citizenship acquired by citizenship or natural-

ization of parents, by treaty, or by act of Congress. When citizenship depends upon the citizenship or naturalization of a parent or husband, the name of the parent or husband shall be stated.

(g) Whether the elector is able to read the Constitution in the English language and to write his name, and whether the elector has any physical disability by reason of which he cannot mark the ballot, in which case the nature of such disability shall be stated.

(h) That the affiant is not disqualified to vote by reason of a felony conviction.

The affiant shall sign the affidavit with his name at length, including given name, middle name or initial, or initial and middle name, and if he is unable to write he shall sign with a mark or cross, and the person before whom the affidavit is made shall insert the date of the affidavit, which shall be the date of the jurat. (Stats. 1961, c. 23, p.——, § 310.)

§ 321. Form of affidavit

Subject to the provisions of this chapter, the body of the affidavit of registration shall be substantially in the following form:

For transfer or change of name

I am registered under the name of.....
in..... Assembly District, ... precinct in said county and request that said registration be cancelled.

AFFIDAVIT OF REGISTRATION

State of California,
County of (.....)—ss.

The undersigned affiant, being duly sworn, says: I will be at least 21 years of age at the time of the next succeeding election, a citizen of the United States 90 days prior thereto, and a resident of the State one year, of the county 90 days, and of the precinct 54 days next preceding such election, and will be an elector of this county at the next succeeding election.

1. I am not now registered as a voter in this State. (If now registered in this county under this or another name, mark out word "not" and fill out transfer clause at top. If now registered in another county, mark out word "not" and execute a separate affidavit of cancellation before registering.)

2. My full name is .....
(including Christian or given name, and middle name or initial and in case of women, the prefix Miss or Mrs.).

3. My residence is .....
between..... and..... Streets, ...
floor, Room.....

4. My occupation is .....

5. My height is..... feet..... inches.

6. I was born in .....
(State or country)

7. I acquired citizenship by (underline method of acquiring citizenship):

a. Decree of court.
b. (Father's naturalization.
(Mother's naturalization.
c. Citizenship of father.
d. Marriage to a citizen.
e. Naturalization of my husband.
f. Act of Congress.
g. Treaty.

When(month / day / year)_____ Where(city / state)_____

My (father's / husband's / mother's) name is (was)_____

(To be filled out when citizenship depends on citizenship or naturalization of parent or husband.)

8. I can_____read the Constitution in the English language; I can_____write my name; I am entitled to vote by reason of having been on October 10, 1911 (a) An elector. (b) More than 60 years of age.

I can_____mark my ballot by reason of_____(State physical disability, if any.)

9. I intend to affiliate at the ensuing primary election with the_____party. (If affiliation is not given, write or stamp "Declines to state.")

10. I am not disqualified to vote by reason of a felony conviction.

_____

(Affiant sign here.)

Residence _____

Subscribed and sworn to before me this _____ day of_____, 19____

_____

County Clerk.

By _____

Deputy County Clerk.

Assembly District_____.

Post office address is_____ Precinct_____

Rural Route No._____ Box No._____

(Stats. 1961, c. 23, p._____, § 321.)

§ 383. Grounds for cancellation

The county clerk shall cancel the registration in the following cases:

(a) At the request of the person registered.

(b) When the insanity of the person registered is legally established.

(c) Upon the production of a certified copy of a subsisting judgment of the conviction of the person registered of any infamous crime or of the embezzlement or misappropriation of any public money.

(d) Upon the production of a certified copy of a judgment directing the cancellation to be made.

(e) Upon the death of the person registered.

(f) If the person registered has not voted at the preceding general election unless the clerk, prior to the time he has canceled the registration, has had written notice from the voter that the voter still resides and has not removed from the residence address stated in the affidavit of registration, or the clerk has had written notice from the voter, or a friend of the voter, that the voter is a war voter, in which case he shall not cancel the registration, but it shall remain permanent unless canceled for any other cause enumerated in this section. If the county clerk has already canceled the affidavit of registration, then upon receipt of the proper information within 30 days after mailing the notice provided for in Section 387, or 60 days in the case of a war voter, he shall restore the affidavit of registration to the files. Stats. 1961, c. 23, p. ——, § 383.)

§ 389. Criminal conviction; cancellation of registration

The county clerk, on the basis of the records of ber in each year, examine the records of the courts having jurisdiction in case of infamous crimes and the embezzlement or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have been finally convicted of an infamous crime or of the embezzlement or misappropriation of public money.

As used in this section, "county clerk" does not include "registrar of voters." (Stats.1961, c. 23, p. ——, § 389.)

§ 390. Record of criminal conviction

The county clerk, on this basis of the records of courts in the county having jurisdiction of such offenses, shall furnish to the registrar of voters in a county where there is a registrar of voters, before the first day of September of each year, a statement showing the names of all persons convicted of infamous crimes or of the embezzlement or misappropriation of public money during the year prior to that first day of September, whose convictions have become final. The registrar of voters shall, during the first week of September in each year, cancel the affidavits of registration of such persons. The county clerk shall certify the statement under the seal of his office.

As used in this section "county clerk" does not include "registrar of voters." (Stats.1961, c. 23, p. ——, § 390.)

§ 14240. Grounds for oral challenge; posting eligibility information

A person offering to vote may be orally challenged within the polling place only by a member of the precinct board upon any or all of the following grounds:

(a) That he is not the person whose name appears on the register.

(b) That he has not been a resident of the state one next next preceding the election.

(c) That he * * * is not a citizen of the United States * * *.

Asterisks * * * indicate deletions by amendment

(d) That he has not been a resident of the county for 90 days preceding the election.

(e) That he has not been a resident of the precinct for 54 days next preceding the election.

(f) That he has voted that day.

(g) That he has been convicted of a felony.

(h) That he has been convicted of the embezzlement or misappropriation of public money.

On the day of the election no person, other than a member of a precinct board or other official responsible for the conduct of the election, shall challenge any voter or question him concerning his qualifications to vote.

If any member of a precinct board receives, by mail or otherwise, any document or list concerning the residence or other voting qualifications of any person or persons, with the express or implied suggestion, request, or remand that such person or persons be challenged, he shall first determine whether the document or list contains or is accompanied by evidence constituting probable cause to justify or substantiate a challenge. In any case, before making any use whatever of such a list or document, the member of the precinct board shall immediately contact the

clerk, charged with the duty of conducting the election, and describe to him the contents of such document or list and such evidence, if any, received bearing on voting qualifications. The clerk shall advise the members of the precinct board as to the sufficiency of probable cause for instituting and substantiating the challenge and as to the law as herein provided, relating to hearings and procedures for challenges by members of the precinct board and determination thereof by a precinct board. The clerk may, if necessary, designate a deputy to receive and answer inquiries from precinct board members as herein provided.

No person shall post or cause to have posted any poster, bill, or placard containing any information concerning eligibility to vote to be displayed on the day of the election within 500 feet of the entrance to a polling place.

(Amended by Stats.1963, c. 1560, p. 3143, § 1; Stats. 1965, c. 1908, p. 4417, §1; Stats.1967, c. 208, p. 1334, § 1; Stats.1971, c. 1760, p. 3807, § 2, urgency, eff. Dec. 16, 1971.)

§ 14246. Oath of criminal conviction

If the challenge is on the ground that the person challenged has been convicted of * * * a felony or

Asterisks * * * indicate deletions by amendment

that he has been convicted of the embezzlement or misappropriation of public money, he shall not be questioned, but the fact may be proved by the pro-

duction of an authenticated copy of the record or by the sworn oral testimony of two witnesses. As amended Stats.1965, c. 1908, p. 4419, § 4.)

Underline indicates changes or additions by amendment

PENAL CODE

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§ 1203.4. Discharged probationer; change of plea or vacation of verdict; dismissal of charge; release from penalties and disabilities; application; pleading prior conviction in prosecution for subsequent offenses

(a) * * * In any case in which a defendant * * * has fulfilled the conditions of * * * probation for the entire period * * * of probation, or has been discharged * * * prior to the termination of the period * * * of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time * * * after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has

been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

Dismissal of an accusation of information pursuant to this section does not permit a person to own, possess, or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021.

This subdivision shall apply to all applications for relief under this section which are filed on or after * * * November 23, 1970.

Asterisks * * * indicate deletions by amendment

§ 4852.01. Notice of intention to apply for certificate of rehabilitation and pardon; application of Chapter

(a) Any person convicted of a felony who has been released from a state prison or other state penal institution or agency in California, whether discharged on completion of the term for which he was sentenced or released on parole prior to May 13, 1943, who has not been incarcerated in a state prison or other state penal institution or agency since his release and who presents satisfactory evidence of a

three-year residence in this State immediately prior to the filing of the petition for a certificate of rehabilitation and pardon provided for by this chapter, may at any time file with the clerk of the county in which he resides a notice of intention to petition for such certificate and pardon, and may at any time after his discharge from custody and termination of his parole file such petition.

(b) Any person convicted of a felony who, on May 13, 1943, was confined in a state prison or other institution or agency to which he was committed and any person convicted of a felony after that date who is committed to a state prison or other institution or agency may file with the clerk of the county in which he resides, at any time after his discharge from custody or release on parole, a notice of intention to apply for a certificate of rehabilitation and pardon in accordance with the provisions of this chapter.

(c) This chapter shall not apply to persons convicted of misdemeanors; to persons who have served time in county jails only; to persons serving a mandatory life parole; to persons committed under death sentences; or to persons in the military service.

§ 4852.13. Certificate of rehabilitation; finding; contents; filing

If, after hearing, the court finds that the petitioner has demonstrated by his course of conduct his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship, the court shall make an order declaring that the petitioner has been

rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. Such order shall be filed with the clerk of the court, and shall be known as a certificate of rehabilitation. The certificate shall show the date on which the original notice of intention to apply for a certificate was filed.

§ 4852.16. Pardon; certificate as application; issuance; recommendation

The certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to Section 1 of Article VII of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court.

§ 4852.17. Report of certificate of rehabilitation or pardon; rights restored by pardon; exceptions

Whenever a person is issued a certificate of rehabilitation or granted a pardon from the Governor under this chapter, the fact shall be immediately reported to the * * * Department of Justice by the court, Governor, officer, or governmental agency by whose official action the certificate is issued or the pardon granted. The * * * Department of Justice shall immediately record the facts so reported on the

former criminal record of the person, and transmit such facts to the Federal Bureau of Investigation at Washington, D.C. When the criminal record is thereafter reported by said * * * department, it shall also report the fact that the person has received a certificate of rehabilitation, or pardon, or both.

Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) the right to vote; (2) the right to own, possess, and keep any type of firearm that may lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 12001 and 12021 of the Penal Code shall apply, if the person was ever convicted of a felony involving the use of an dangerous weapon.

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3 American West (Western History Association Quarterly) Reinhardt, Tapeworm Tickets and Shoulder Strikers, pp. 34, 37 (1966)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, Individually and as a representative of the class of all other County Clerks and Registrars of Voters, *Petitioner,*

VS.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, ABRAN RAMIREZ, LARRY GILL, and ALBERT LEE, individually and on behalf of a class of over 100,000 previously disfranchised Cali-

fornia electors, respectfully pray, for the reasons expressed herein, that the petition for a writ of certiorari be denied. The jurisdiction of this Court has been invoked by petitioner, a California County Registrar of Voters, seeking to reverse a unanimous judgment by the California Supreme Court in *Ramirez v. Brown,* 9 Cal.3d 199 (1973), restoring the right to vote to certain ex-felons in California.[1]

QUESTION PRESENTED

Whether the denial of the right to vote, through the unequal application of California's voting laws, violates the principles of equal protection.

STATEMENT OF THE CASE

Article II, Section 3 of the California Constitution denies suffrage to those who have been convicted of "infamous crimes".[2] In 1966, the California Supreme Court interpreted Article II, Section 1 and related constitutional and statutory provisions to exclude from the voting rolls those persons who had been convicted of crimes which threatened "the purity of the ballot box". *Otsuka v. Hite,* 64 Cal.2d 596 (1966).

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[1]Respondents below were California's Secretary of State, represented by California's Attorney General, and all 58 County Registrars. Petitioner herein is one of those County Registrars, the Registrar of Mendocino County.

[2]In the November, 1972 general election, Article II, Section 1 of the California Constitution was re-enacted by referendum as Article II, Section 3.

Since that time, California's 58 Registrars of Voters have established 58 separate and often inconsistent policies as to which of California's several hundred felonies were "infamous crimes" and which were not.

Respondents, RAMIREZ, GILL, and LEE, sought an original writ of mandate in the California Supreme Court on behalf of themselves and those California ex-felons whom they represented[3] to require California's Chief Election Officer, the Secretary of State, and all of California's 58 County Registrars to register those ex-felons whose terms of incarceration and parole had expired.[4] The original jurisdiction of the California Supreme Court was invoked because of the state-wide impact of the questions involved and the then impending national elections. *Ramirez, supra,* at 202-203.

Respondents presented the California Supreme Court with data showing the state-wide geographical disparities in application of the "infamous crime" standard. In reviewing the evidence presented, the California Supreme Court held in a unanimous decision that the disfranchisement of ex-felons who were not then incarcerated or on parole was no longer constitutionally permissible in California. *Ramirez v. Brown, supra.*

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[3]Other named Respondents are three non-profit organizations whose members are directly adversely affected by ex-felon disfranchisement, and the California League of Women Voters, a non-profit California corporation whose purpose is to promote active citizen participation in government.

[4]As requested by petitioners below, the opinion in *Ramirez* is specifically limited to those ex-felons whose terms of incarceration and parole have been completed. 9 Cal.3d at 217, n. 18.

ARGUMENT

I

CALIFORNIA'S ELECTION PRACTICES, HISTORY AND PRIOR COURT RULINGS LED TO A CHAOTIC SITUATION WHICH REQUIRED THE CALIFORNIA SUPREME COURT TO REASSESS THE DISFRANCHISEMENT OF EX-FELONS IN THAT STATE.

A. The California Supreme Court, Faced With A Pattern Of Unequal Application Of The Vague "Infamous Crime" Standard, Decided The Issue In This Case On A Series Of Facts Unique To California.

Under the California Constitution as interpreted in *Otsuka v. Hite,* 64 Cal.2d 596 (1966), each of California's 58 County Registrars individually decided which crimes were "infamous" so as to bar their perpetrators from the voting lists. Pursuant to his responsibilities to apply election laws in a uniform manner, California's Secretary of State conducted a survey in early 1972 of the registration practices of California's 58 County Registrars. The results of this survey clearly show that the term "infamous crime" was interpreted by each County Registrar on an ad hoc basis and resulted in a hodge podge of rules and standards. A chart indicating the results of the Secretary's survey appears in the Appendix hereto, but the following are clear examples of the geographical disparity in the application of California's election laws that existed at the time respondents petitioned the California Supreme Court for relief:

> [A] A person convicted of burglary who had been released from prison and parole was registered and permitted to vote if he lived in Alameda, Contra Costa, Fresno, Marin, San Joaquin,

Sonoma, or Yuba Counties. He was denied registration if he lived in El Dorado, San Bernardino, or Santa Cruz Counties.

[B] Similarly, at least eight counties (Yolo, Sonoma, Santa Clara, San Francisco, San Diego, Sacramento, Contra Costa, and Alameda) would have registered a robbery ex-felon whereas seven others (Siskiyou, Santa Cruz, San Joaquin, San Bernardino, Orange, Monterey, and Los Angeles) would not.

[C] Twenty-one counties indicated they would register an ex-felon convicted of possession of dangerous drugs, but Butte and San Joaquin would not. San Bernardino would register one convicted of possession but not one convicted of use. Orange, San Bernardino, and Santa Cruz would register one convicted of possession or use but not sale of drugs. At least nine of the others register all three.

[D] Butte County indicated that it would not register a person convicted of drunk driving causing death but would register one convicted of wife beating. San Bernardino would not register one convicted of "sex charges" but would register an ex-felon convicted of child molesting. San Diego County would register one convicted of first degree murder but not one convicted of non-support. Los Angeles County would not register an ex-felon whose crime was statutory rape but apparently would register one who was guilty of forcible rape. Santa Clara permitted registration

if the crime was prostitution, but San Bernardino would not.

[E] Several counties registered those convicted of embezzling, forgery, or insufficient funds. (Alameda, Colusa, Contra Costa, Marin, Riverside, Sacramento, Santa Clara and San Francisco). Santa Clara would register one convicted of income tax evasion but Los Angeles would not. San Joaquin registered one convicted of transporting counterfeiting tools but denied the franchise to another guilty of issuing bad checks.

[F] The responses of Sonoma and San Joaquin Counties indicated that they had a "two-conviction" rule. There, persons convicted of two non-infamous crimes, such as assault and armed robbery, would be refused registration because two non-infamous crimes were apparently equivalent to one infamous crime.

Thus, the total lack of uniformity in the application of California's election laws had resulted in the choice of a county of residence being the deciding factor in respondents' efforts to register and vote.[5] The practice of each California county to treat the enfranchisement of ex-felons differently was brought squarely before the Court below. These inconsisten-

[5]At the time of the Secretary of State's survey, petitioner Viola Richardson, Mendocino County's Registrar, had no written guidelines for determination of which former felons were eligible to register. An ex-felon who attempted to register was told to make an appointment to discuss his case with the local district attorney. (Exhibit "D" to petition below).

cies showed that the "infamous crime" disqualification, as expounded by *Otsuka, supra,* was not susceptible of an even-handed, uniform application by California's County Registrars. The California Supreme Court's construction of the "infamous crime" provision to include some but not all ex-felons (In *Otsuka, supra*) and the disparities in application which followed are facts which restrict the applicability of the decision below to California. The principles indicated therein do not necessarily conflict with decisions rendered by other courts, in other states, in different circumstances.

B. The Decision Below Rests Heavily Upon The Singular History Of California's Election Laws And Practices And The Present Day Statutory Scheme To Safeguard Against Election Fraud.

Prior to *Otsuka v. Hite, supra,* all persons convicted of an "infamous crime" were prohibited from registering and voting in California. The rationale for such disfranchisement lay in the history of California's voting laws and practices. From its inception, California restricted the franchise. California's Constitutional Convention adopted the "infamous crime" exclusion in 1849. Browne, *Debates in the Convention of California,* 75, 481 (1850). Records of early California elections indicate that Californians may have justifiably feared that unscrupulous individuals would corrupt the electoral process.[6]

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[6]"By custom, the ballot box was any sort of paltry cubical container found lying about the neighborhood. In San Francisco's first municipal election under American auspices, in 1846, they used an empty crate that had held flasks of lemon syrup. Down at the

The California Supreme Court recognized both this historical background and the evolution of California's voting practices into an orderly, regulated institution. *Ramirez v. Brown,* at 212-214, n. 11, 12.[7] In fact, the Court found that voting fraud in California today is not a realistic possibility nor a valid rationale for a blanket disfranchisement of ex-felons:

> "Taken together, these and other reforms of the past hundred years have radically diminished the possibility of election fraud in California. The voting and counting process is now thoroughly hemmed in by control mechanisms at every stage, so that deliberate irregularities, if present today, are rare and have negligible effects on election results. (Note (1967) 14 U.C. L.A. L.Rev. 699, 702 (reporting that the Los Angeles County Registrar of Voters had received no complaints of this type for the previous 41 years).) In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty,

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Pueblo de Nuestra Senora La Reina de Los Angeles, known to the Yankees as 'Loss Anjeluss', it was a candle box perched on the window ledge of an adobe shack. And in Vallejo, up the Bay from San Francisco, the election officers simply trotted out the same old cracker box, year after year, until someone discovered that one of the judges was tucking supplementary ballots through a knothole in the back. These vulnerable, virgin ballot boxes, crude as they were, attracted hordes of eager citizens, some of whom came to vote not once but several times. There was no register; the ballots were not numbered; and every man was encouraged to exercise his franchise, whether he was entitled to it or not. Even the crews of two French men-of-war voted in one San Francisco election." Reinhardt, *Tapeworm Tickets and Shoulder Strikers,* 3 *American West* 34, 37 (Western History Association Quarterly) 1966.

[7]While some states may indeed have valid problems concerning election fraud, California is not one. The last reported case of vote buying in California occurred in 1908. *Bush v. Head,* 154 C. 277, (1908).

furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squadron of computer technicians. [Footnote omitted]" 9 Cal.3d at 214.

A similar development in the penal sanctions of California's election laws led the Court below to the finding that adequate statutory deterrents to fraud were available in California:

"The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, ch. 38, pp. 110-111, §§98-105). Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors [Footnote omitted] . . . These sanctions are even more pervasive than those characterized by the Supreme Court in *Dunn* as 'more than adequate to detect and deter whatever fraud may be feared' [citation]." 9 Cal.3d at 215-216.

The California Supreme Court's review of and reliance upon California's historical and current election laws and practices emphasizes the unique position of this case. Again, that court's decision does not conflict with opinions rendered in other states having different election law histories and statutory schemes.[8]

[8]In fact, the trend is toward an elimination of the restrictions on former-felons voting. At the time of filing the petition below, forty percent of the states either did not disfranchise those convicted of a felony (four states), only disqualify those convicted of

II

IN VIEW OF THE FACTS PRESENTED TO THE COURT BELOW, THE CALIFORNIA SUPREME COURT PROPERLY HELD THAT DISFRANCHISEMENT OF EX-FELONS IN CALIFORNIA IS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

State statutes that restrict the right to vote must be necessary to promote a compelling state interest. *Dunn v. Blumstein,* 405 U.S. 330 (1972), *Bullock v. Carter,* 405 U.S. 134 (1972), *Kramer v. Union Free School District,* 395 U.S. 621 (1969).[9] This constitutional standard was not disputed by any of the parties below nor is it questioned by petitioner, the Mendocino County Registrar.

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an election code violation (two states) or provided an automatic restoration of civil rights upon completion of sentence (fifteen states). The twenty-one states are: Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, and Wisconsin. (Appendix "B" to petition below).

[9]In 1969, this Court held in *Kramer v. Union Free School District,* 395 U.S. 621, 627 (1969), that non-parents could not be denied the franchise in school district elections because such an exclusion was not "necessary to promote a compelling state interest". In *Bullock v. Carter,* 405 U.S. 134 (1972), the Court struck down a Texas primary election filing fee system. The Court found that although there was a valid state interest involved, "other means to protect those valid interests are available". 405 U.S. at 146. Decided in the same term was *Dunn v. Blumstein,* 405 U.S. 330 (1972). In *Dunn,* the Court considered a Tennessee residence qualification and held that Tennessee had adequate procedural safeguards and penal sanctions available to "preserve the purity of the ballot box". 405 U.S. at 346. In the case decided below, the California Supreme Court considered present election laws and practices in California and found: "For the reasons stated in *Dunn,* we hold that the enforcement of modern [California] statutes regulating the voting process and penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is the least burdensome on the right of suffrage. It follows that such disfranchisement is not 'necessary' within the meaning of *Dunn* and its predecessors, to achieve that goal." *Ramirez v. Brown, supra* at 216.

Rather, petitioner argues that—conceding that there is no compelling interest in California for disfranchising former felons—California may nevertheless deny the right to vote to ex-felons because of the language of Section 2 of the Fourteenth Amendment of the United States Constitution. Section 2 of that Amendment provides for reduction of representation in the Congress when a state denies the franchise to 21 year old male residents of the state, "except for participation in rebellion or other crime". In support of her contention, the Mendocino County Registrar states at page ten of her Petition, "It has been consistently held that Section 2 of the Fourteenth Amendment permits the states to disenfranchise for crime", citing *Davis v. Beason,* 133 U.S. 333 (1890), *Trop v. Dulles,* 356 U.S. 86 (1958), and *Lassiter v. Northampton County Board of Elections,* 365 U.S. 45 (1959).

To put it charitably, reliance upon these three cases is misleading. Nowhere in the text of the decision in *Davis v. Beason, supra,* is Section 2 of the Fourteenth Amendment even mentioned. Nor did the case deal with ex-felon voting. Mr. Justice Field begins the opinion of the Court with the following statement:

> "On this appeal our only inquiry is whether the district court of the territory had jurisdiction of the offense charged in the indictment, of which the defendant was found guilty [Registering to vote although a Mormon]. If it had jurisdiction, we can go no further. We cannot look into any alleged errors in its rulings, on the trial of the defendant. The writ of *habeas corpus* cannot be turned into a writ of error to review the action of that court." 133 U.S. at 341.

In fact, *Davis, supra,* dealt with an Idaho territorial statute denying the right to vote to bigamists or polygamists who taught or counselled others to become bigamists or polygamists. The Court considered whether an act of Congress also dealing with polygamists voting conflicted with the territorial statute and held that it did not. Petitioner has misconstrued the case with the aid of four ellipses eliminating all reference to polygamy and bigamy, while leaving in statutory sections not in fact under consideration by the Court.

Trop v. Dulles, 356 U.S. 86 (1958), the second case relied upon by petitioner for the proposition that this Court has "consistently held that Section 2 of the Fourteenth Amendment permits the states to disenfranchise for crime", also makes absolutely no reference to Section 2 of the Fourteenth Amendment. *Trop, supra,* involved a statute that prescribed loss of citizenship as punishment for conviction by court-martial of wartime desertion. This Court held that the statute violated the Eighth Amendment of the United States Constitution.

In the third case, *Lassiter v. Northampton County Board of Elections,* 365 U.S. 45 (1959), this Court upheld a North Carolina statute and constitutional provision that made literacy a voter registration prerequisite. Section 2 of the Fourteenth Amendment *is* mentioned in the opinion but was cited only for the proposition that the "right to vote" is not absolute and may be, within reason, regulated by the states. 365 U.S. at 51. This Court made no holding or com-

ment whatever concerning the impact of Section 2 on persons disfranchised for crime.

Contrary to petitioner's claims, this Court has declined to give weight to the contention that Section 2 of the Fourteenth Amendment somehow affects or controls the ambit of the equal protection clause as it is applied to the right to vote.

In *Oregon v. Mitchell,* 400 U.S. 112, 152 (1970), *Carrington v. Rash,* 380 U.S. 89, 97 (1965), and *Reynolds v. Sims,* 377 U.S. 533, 589 (1964), Mr. Justice Harlan, dissenting, urged that this Court give Section 2 the almost identical construction now urged by petitioner. In each case this Court did not do so. In fact, the Court in *Oregon* upheld a federal law passed pursuant to the equal protection clause of the Fourteenth Amendment preventing the states from denying the franchise in federal elections to those persons eighteen years of age despite the specific language of Section 2 stating that no penalty shall be suffered by the states for denial of suffrage to persons under twenty-one years of age.

As stated by the court in *Stephens v. Yeomans,* 327 F.Supp. 1182 at 1185, (1970), in holding a New Jersey ex-felon disfranchising provision unconstitutional:

> "In his dissenting opinion in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), Justice Harlan outlined the analytical and historical argument that the equal protection clause of the Fourteenth Amendment was not intended to apply to state voting qualification laws.

He pointed to the express language in Section 2 of the Fourteenth Amendment, as well as to interpretations contemporaneous with the adoption of that Amendment. The defendant also relied on Section 2 of the Fourteenth Amendment. But Justice Harlan's view has not prevailed, and it is now established that a state voter classification disfranchising resident citizens must pass equal protection muster under the equal protection clause of the Fourteenth Amendment."

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

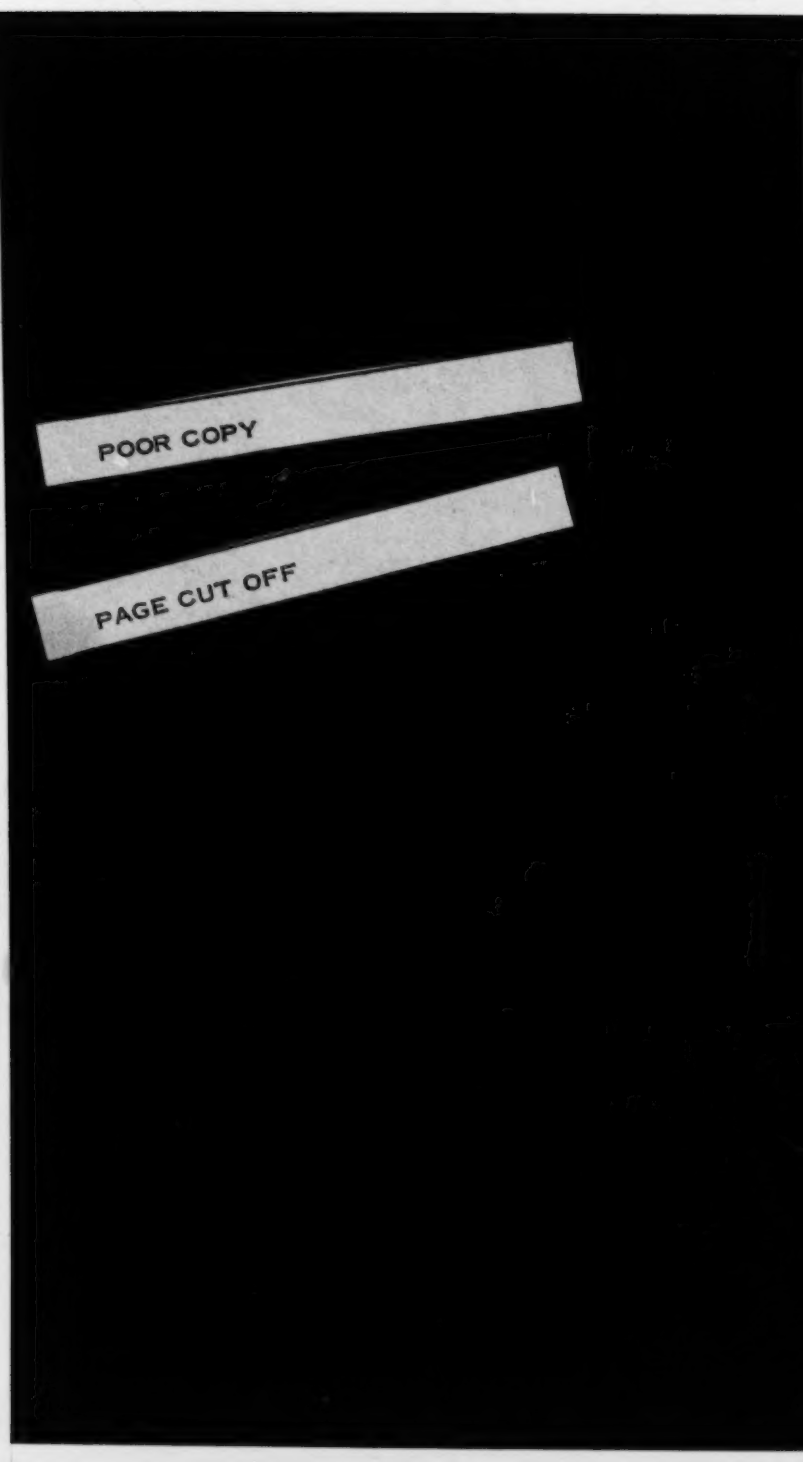
Dated, July 19, 1973.

Respectfully submitted,

MARTIN R. GLICK,
JAMES M. MATTESICH,
DAVID KIRKPATRICK,
LUCY KELLY MCCABE,
GENE LIVINGSTON,
California Rural Legal Assistance,
BURTON D. FRETZ,
Migrant Legal Action Program,
Attorneys for Respondents.

DONALD G. GREEN,
SARA E. GREEN,
League of Women Voters
Education Fund,
Of Counsel.

(Appendix Follows)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COLUSA							
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DEL NORTE							
EL DORADO	2/						
FRESNO			Yes	Yes	Yes		
GLENN	Unclear						
IMPERIAL	2/		Yes				No--public
KERN	4/						No
KINGS	Unclear						
LAKE	2/ Must receive pardon						
LASSEN			Yes				No
LOS ANGELES	2/		Yes-m	Yes-m			
MADERA	2/ Unclear						
MARIN			Yes		Yes-(LSD)		
MENDOCINO	Unclear						
MERCED	Unclear						
MODOC	Unclear						
MONO			Yes				
MONTEREY	2/						
NAPA	Unclear						
NEVADA	Unclear						
ORANGE			Yes-m		No		No
PLACER	Unclear						
RIVERSIDE	5/		Yes-m				No--public
SAN BENITO	2/ Unclear						
SAN BERNARDINO			Yes	No	No	Yes - felony	
SACRAMENTO	1/	No	Yes	Yes	Yes	Yes	Yes
SAN DIEGO	6/		Yes				No
SAN FRANCISCO	1/	No	Yes	Yes	Yes	Yes	No--public
SAN JOAQUIN	2/		No		No		
SANTA BARBARA			Yes				
SAN MATEO		No	Yes-m	Yes-m	Yes-m		
SANTA CLARA	2/		Yes	Yes	Yes		
SANTA CRUZ					No		
SHASTA	Unclear						
SISKIYOU			Yes-m				
SOLANO			Yes	Yes	Yes		
SONOMA			Yes		Yes		
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TULARE	Unclear						
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YOLO		No	Yes				

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EL DORADO			No					
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IMPERIAL								
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LASSEN								
LOS ANGELES			No			No Stat.	No	No
MADERA	Unclear							
MARIN			Yes-card credit			Yes Stat.		
MENDOCINO	Unclear							
MERCED	Unclear							
MODOC	Unclear							
MONO								
MONTEREY			No				No	No-armed
NAPA	Unclear							
NEVADA	Unclear							
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PLACER	Unclear							
RIVERSIDE			Yes		Yes/2nd deg.			
SAN BENITO	Unclear							
SAN BERNARDINO			No		No/2nd deg.			No
SACRAMENTO		Yes	No	Yes	Yes	Yes	No	Yes
SAN DIEGO		Yes	No		Yes	Yes		Yes
SAN FRANCISCO		Yes	No	No	Yes	Yes	No	Yes
SAN JOAQUIN			No					No-armed
SANTA BARBARA				No	No			
SAN MATEO			No		No, 1st deg.	No	No	No
SANTA CLARA			NO		Yes-2nd deg.	Yes		Yes-armed
SANTA CRUZ			No		No		No	No-armed
SHASTA	Unclear							
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SOLANO			No					
SONOMA			No		No			Yes
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VENTURA								
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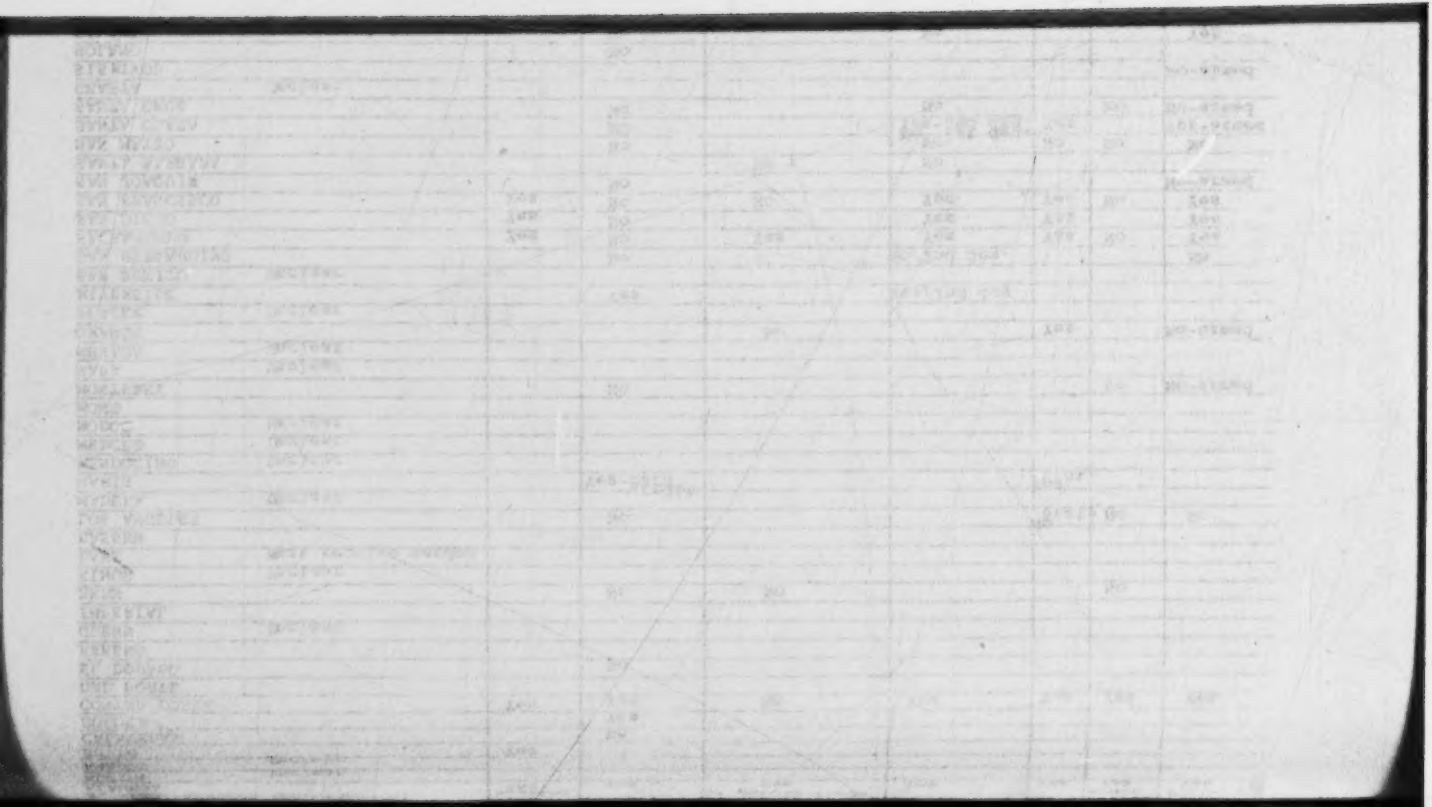

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AMADOR	Unclear						
BUTTE							
CALAVERAS							
COLUSA							
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE				Yes 3/			
EL DORADO				No	No		
FRESNO				Yes			
GLENN	Unclear						
IMPERIAL						No	
KERN							No
KINGS	Unclear						
LAKE	Must receive pardon						
LASSEN							
LOS ANGELES					No		No
MADERA	Unclear						
MARIN				Yes			
MENDOCINO	Unclear						
MERCED	Unclear						
MODOC	Unclear						
MONO							
MONTEREY							No
NAPA	Unclear						
NEVADA	Unclear						
ORANGE							
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SAN BENITO	Unclear						
SAN BERNARDINO		Yes		No			
SACRAMENTO		Yes	Yes	Yes	Yes	Yes	No
SAN DIEGO		Yes	Yes				
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes	No
SAN JOAQUIN		1/		Yes			
SANTA BARBARA							
SAN MATEO				No			No
SANTA CLARA							
SANTA CRUZ				No			No
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SISKIYOU							
SOLANO		Yes					
SONOMA		No 8/		Yes			
TEHAMA	Unclear						
TULARE	Unclear						
TUOLUMNE							No
VENTURA							
YOLO							
YUBA				Yes			No

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ALPINE	Unclear							
AMADOR	Unclear							
BUTTE								
CALAVERAS								
COLUSA								
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE								
EL DORADO				No				
FRESNO								
GLENN	Unclear							
IMPERIAL								
KERN		No						
KINGS	Unclear							
LAKE	Must receive pardon							
LASSEN								
LOS ANGELES		No	No	No	No	No	No	No
MADERA	Unclear							
MARIN					Yes			
MENDOCINO	Unclear							
MERCED	Unclear							
MODOC	Unclear							
MONO								
MONTEREY		No						
NAPA	Unclear							
NEVADA	Unclear							
ORANGE								
PLACER	Unclear							
RIVERSIDE								Yes
SAN BENITO	Unclear							
SAN BERNARDINO								No
SACRAMENTO		No	Yes	Yes	Yes	Yes	Yes	Yes
SAN DIEGO		No						
SAN FRANCISCO		No	Yes	Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN			No	No		No		No
SANTA BARBARA					Yes			
SAN MATEO		No		No				
SANTA CLARA		No			Yes	Yes		Yes
SANTA CRUZ		No	No	No				No
SHASTA	Unclear							
SISKIYOU								
SOLANO				No				
SONOMA								
TEHAMA	Unclear							
TULARE	Unclear							
TUOLUMNE		No						
VENTURA								
YOLO		No			Yes			
YUBA								

ALAMEDA		Yes	Yes	Yes	Yes	Yes	Yes
ALPINE	Unclear						
AMADOR	Unclear						
BUTTE							
CALAVERAS							
COLUSA							
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE							
EL DORADO							
FRESNO							
GLENN	Unclear						
IMPERIAL							
KERN							
KINGS	Unclear						
LAKE	Must receive pardon						
LASSEN							
LOS ANGELES		No	No				
MADERA	Unclear						
MARIN				Yes	Yes		
MENDOCINO	Unclear						
MERCED	Unclear						
MODOC	Unclear						
MONO							
MONTEREY					Yes		
NAPA	Unclear						
NEVADA	Unclear						
ORANGE							
PLACER	Unclear						
RIVERSIDE							
SAN BENITO	Unclear						
SAN BERNARDINO			Yes			No	No
SACRAMENTO		Yes	Yes	Yes	Yes	Yes	Yes
SAN DIEGO			Yes		Yes		Yes
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN			No				
SANTA BARBARA							
SAN MATEO							
SANTA CLARA		Yes	Yes		Yes	Yes	
SANTA CRUZ							
SHASTA	Unclear						
SISKIYOU							
SOLANO							
SONOMA							
TEHAMA	Unclear						
TULARE	Unclear						
TUOLUMNE		No					
VENTURA							Yes
YOLO					Yes		
YUBA							

	(NO - REFUSED REGISTRATION)	Prostitution	Fraud	Bail Support	Smuggling	Arson	Accessory	Harboring
ALAMEDA		Yes	Yes	Yes	Yes	Yes	Yes	Yes/Bail
ALPINE	Unclear							
AMADOR	Unclear							
BUTTE								
CALAVERAS								
COLUSA								
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes	Yes	Yes
DEL NORTE								
EL DORADO								
FRESNO								
GLENN	Unclear							
IMPERIAL								
KERN								
KINGS	Unclear							
LAKE	Must receive pardon							
LASSEN								
LOS ANGELES								
MADERA	Unclear							
MARIN								
MENDOCINO	Unclear							
MERCED	Unclear							
MODOC	Unclear							
MONO								
MONTEREY								
NAPA	Unclear							
NEVADA	Unclear							
ORANGE								
PLACER	Unclear							
RIVERSIDE								
SAN BENITO	Unclear							
SAN BERNARDINO		No						
SACRAMENTO		Yes	Yes	Yes	Yes	Yes	Yes	Yes
SAN DIEGO			No	No	Yes	Yes	Yes	
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN			No					Yes
SANTA BARBARA								
SAN MATEO								
SANTA CLARA		Yes					Yes	
SANTA CRUZ			No					
SHASTA	Unclear							
SISKIYOU								
SOLANO								
SONOMA								
TEHAMA	Unclear							
TULARE	Unclear							
TUOLUMNE								
VENTURA								
YOLO								

ALAMEDA		Yes	Yes	Yes	Yes	Yes
ALPINE	Unclear					
AMADOR	Unclear					
BUTTE						
CALAVERAS						
COLUSA						
CONTRA COSTA		Yes	Yes	Yes	Yes	Yes
DEL NORTE						
EL DORADO						
FRESNO						
GLENN	Unclear					
IMPERIAL						
KERN						
KINGS	Unclear					
LAKE	Must receive pardon					
LASSEN						
LOS ANGELES			Yes-m			Yes
MADERA	Unclear					
MARIN						
MENDOCINO	Unclear					
MERCED	Unclear					
MODOC	Unclear					
MONO						
MONTEREY						
NAPA	Unclear					
NEVADA	Unclear					
ORANGE						
PLACER	Unclear					
RIVERSIDE						
SAN BENITO	Unclear					
SAN BERNARDINO			Yes			
SACRAMENTO		Yes	Yes	Yes	Yes	Yes
SAN DIEGO						
SAN FRANCISCO		Yes	Yes	Yes	Yes	Yes
SAN JOAQUIN		Yes	Yes			
SANTA BARBARA				No		
SAN MATEO			Yes-m	No	No	
SANTA CLARA			Yes	Yes		
SANTA CRUZ				No	No	
SHASTA	Unclear					
SISKIYOU						
SOLANO			Yes	Yes		
SONOMA				(Attempt)		
TEHAMA	Unclear					
TULARE	Unclear					
TUOLUMNE						
VENTURA						
YOLO						

		Extortion Yes	Footnotes
ALAMEDA			
ALPINE	Unclear		1/ Indicates "all others are registered".
AMADOR	Unclear		2/ Any person placed on probation who does not
BUTTE			actually serve time will be registered.
CALAVERAS			3/ One person convicted of second degree burglary,
COLUSA			given a suspended sentence and probation, was permitted to
CONTRA COSTA		Yes	register.
DEL NORTE			4/ Their standard is non-registration of persons who
EL DORADO			"constitute a practical threat to the elective process and
FRESNO			no alternative exists that will protect the elective pro-
GLENN	Unclear		cess".
IMPERIAL			5/ "Our position generally has been on the lenient
KERN			side to restore the right of the individual to vote".
KINGS	Unclear		6/ "Crimes of violence felons" may register.
LAKE	Must receive pardon		7/ Apparently an ex-felon convicted of assault and
LASSEN			armed robbery was denied while an ex-felon convicted of
LOS ANGELES			burglary and assault with a deadly weapon was permitted
MADERA	Unclear		to register.
MARIN			8/ Was denied for combination of assault and grand
MENDOCINO	Unclear		larceny.
MERCED	Unclear		9/ Incorporated in their definition of "infamous
MODOC	Unclear		crime" the list sets out in West's California Digest.
MONO			Vol. 21, Words and Phrases at 539.
MONTEREY			
NAPA	Unclear		
NEVADA	Unclear		
ORANGE			
PLACER	Unclear		
RIVERSIDE		Yes	
SAN BENITO	Unclear		
SAN BERNARDINO			
SACRAMENTO		Yes	
SAN DIEGO			
SAN FRANCISCO		Yes	
SAN JOAQUIN			
SANTA BARBARA			
SAN MATEO			
SANTA CLARA			
SANTA CRUZ			
SHASTA	Unclear		
SISKIYOU			
SOLANO			
SONOMA			
TEHAMA	Unclear		
TULARE	Unclear		
TUOLUMNE			
VENTURA			
YOLO			
YUBA			

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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA SUBMITTED ON BEHALF OF PETITIONER

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ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA SUBMITTED ON BEHALF OF PETITIONER

SUMMARY OF ARGUMENT

Section 2 of the Fourteenth Amendment expressly excludes persons convicted of crimes (felons) from the right to the franchise and, therefore, they are not a class entitled to vote by virtue of the Equal Protection Clause contained in Section 1 of the Fourteenth Amendment. That latter Clause was never intended by the framers of the Amendment to apply to convicted felons and should not now be stretched to permit them

to cast a ballot. This is particularly true in a state like California which has specific statutes providing for a speedy and inexpensive judicial review of each felon's case and situation to determine whether the nature of the crime, length of time since its commission, and rehabilitation of the offender warrant reinstitution of his franchise rights.

ARGUMENT

I. The equal protection clause of Section 1 of the Fourteenth Amendment should not be stretched to encompass convicted felons in derogation of the express exclusion of such a class from the franchise as provided for in Section 2 of the Fourteenth Amendment

In recent years this Court has decided a number of cases in which state imposed restrictions on various aspects of the right to vote have been invalidated under the Equal Protection Clause of Section 1 of the Fourteenth Amendment. See, for example, *Dunn* v. *Blumstein,* 405 U.S. 330 (1973), severely curtailed voter durational residence requirements; *Kramer* v. *Union School District,* 395 U.S. 621 (1969), residence, property owning, or leasing requirement held invalid as related to school district election; *Carrington* v. *Rash,* 380 U.S. 89 (1965), denial of vote to soldier who was bona fide resident held invalid. In none of these cases, however, has any such extension of the right to vote occurred which covers a situation within the language of Section 2 of the Fourteenth Amendment. *Oregon* v. *Mitchell,* 400 U.S. 112 (1970) does invalidate state age requirements over eighteen years because of the

federal Voting Rights Act amendments, but only in national and not state elections.

Section 2 reads:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote* at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, *is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime,* the basis of the representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis added.)

Section 2 covers sex, age, alienage, and criminality. Significantly, constitutional amendments have been necessary to require states to permit women to vote and to permit eighteen year olds to vote in state elections. Similarly, it would appear that constitutional amendments are necessary to permit aliens to vote and, as in the instant case, to permit convicted criminals to vote.

In fact, insofar as criminality is concerned, this Court has twice recently had before it the issue of whether a state may constitutionally disenfranchise convicted felons who are otherwise qualified to vote, and in each instance, the Court has affirmed lower three-judge court rulings that such disenfranchisement is constitutionally permissible.

In *Beacham* v. *Braterman,* 300 F.Supp. 182 (1969) (D.C. S.D. Fla.), affirmed without opinion October 20, 1969, 396 U.S. 12, disenfranchising Florida constitutional and statutory provisions were upheld. And in *Fincher* v. *Scott,* 352 F.Supp. 117 (1972) (D.C. M.D.N.C.), affirmed without opinion May 7, 1973, --- U.S. ---, 36 L.Ed.2d 681, 93 S.Ct. 2151, disenfranchising North Carolina constitutional and statutory provisions were upheld.

The rationale in *Beacham* was that such disenfranchisement must be constitutionally permissive because the Justices of the Supreme Court of the United States have on so many occasions used it as an example of what states may do with propriety.

The *Beacham* Court said:

> "The initial question before the Court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which effect that exclusion are valid.

"The Second Circuit Court of Appeals in Green v. Board of Elections of the City of New York, 380 F.2d 445 (1967), cert. den. 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed2d 840, recently addressed itself to that question and decided that it presented an insubstantial issue which did not require the convening of a three judge court. We agree with that Court that '[e]ven though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized—indeed put forward by the Justices to illustrate what the states *may* properly do—that such expressions cannot be dismissed as unconsidered dicta.' (Emphasis theirs.) (Citations omitted.)

Beacham v. *Braterman, supra,* at pp. 183–184.

In *Fincher,* besides adopting this *Beacham* reasoning, the lower court pointed out that the Equal Protection Clause of the United States Constitution, Fourteenth Amendment, Section 1, must be read in light of Section 2 which expressly permits disenfranchisement of convicted felons without reduction of representation of states in Congress. The Court said:

"We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause. The U. S. Const. amend. XIV, § 2, provides in relevant part:

> 'But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . .'

"Section 2 expressly allows the exclusion of felons from the franchise without reduction of representation. As early as 1873, it was stated:

> 'This view is assumed in the second section of the fourteenth amendment, which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants.'

"*United States* v. *Anthony*, 24 Fed.Cas. No. 14,459, pp. 829, 831 (C.C.N.D.N.Y. 1873). Recently this position has been restated.

'The framers of the Amendment, says the Attorney General, could hardly have intended the general language of § 1 to outlaw a discrimination which § 2 expressly allowed without the penalty of reduced representation. The argument is convincing. We see nothing in the language or in history to support plaintiff's suggestion that "other crimes" meant only a crime connected with the rebellion. The Court's rejection of Mr. Justice Harlan's position that § 2 is the only portion of the Fourteenth Amendment dealing with voting rights, see Reynolds v. Sims, supra, 377 U.S. at 589 [84 S.Ct. 1362, 12 L.Ed.2d 506] in no way indicates it would deny that § 1 of the Amendment cannot be fairly read to prohibit a discrimination which § 2 expressly permits—especially in the light of the Justice's frequent and consistent statements approving voting disqualification for felony.' "[*Green* v. *Board of Elections*] 380 F.2d at 452. *Accord*, Kronlund v. Honstein, 327 F.Supp. 71 (N.D.Ga.1971); Beacham v. Braterman, 300 F.Supp. 182 (S.D.Fla.), aff'd without opinion, 396 U.S. 12, 90 S.Ct. 153, 24 L.Ed.2d 11 (1969). *Contra*, Stephens v. Yeomans, 327 F.Supp. 1182 (D.N.J.-1970). Putting it positively, we think § 1 must be read in light of § 2, and, so read, denial of the franchise to felons is specifically excepted from the Equal Protection Clause contained in § 1.

"While it may be more desirable from a correctional point of view to give felons the right to

vote, Comment, 50 N.C.L. Rev. 903, 909–10 (1972), we are convinced the states are not constitutionally required to do so." *Fincher* v. *Scott,* 352 F.Supp. 117, 119 (D.C.M.D. N.C. 1972).

Additionally, in *Green* v. *Board of Elections* (2nd Cir.), 380 F.2d 445 (1967) this Court denied certiorari (398 U.S. 1048 (1968)) after the Court of Appeals upheld the contention that insofar as the dichotomy between Section 1 and Section 2 of the Fourteenth Amendment existed, the sections were independent and of equal standing, and therefore convicted felons could be denied the franchise by a state acting under Section 2. In *Green* the Court said:

> "Plaintiff places heaviest weight on the equal protection clause of the Fourteenth Amendment, relied upon in such landmark decisions as the apportionment cases, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L. Ed.2d 821 (1963), and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); and the voter qualification cases, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), and Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). But none of those decisions intimates that the states are without power to continue their historic exclusion from the franchise of persons convicted of all or certain types of felonies. Even though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so

frequently recognized—indeed put forward by the Justices to illustrate what the states *may* properly do—that such expressions cannot be dismissed as unconsidered dicta. See, in addition to the statements in Davis v. Beason, 133 U.S. 333, 346–347, 10 S.Ct. 299, 33 L.Ed. 637 (1890), and Estep v. United States, 327 U.S. 114, 122 n. 13, (1946), such recent expressions as those in Trop v. Dulles, 356 U.S. 86, 96–97, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C.J.); Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959) (Douglas, J.); Gray v. Sanders, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (Douglas, J.); and Harper v. Virginia State Board of Elections, 383 U.S. 663, 673, 675 n. 4, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (dissenting opinion of Black, J.).

"This general recognition rests on the established principle that 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584, 55 S.Ct. 538, 540, 79 L.Ed. 1070 (1935) (Stone, J.). The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man 'authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due'. [Footnote omitted.] A man who breaks the laws he has authorized his

agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. See The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice, 45–47, 187–196 (1967). A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be. There may, of course, be crimes that would not come within the definition of a particular state law on exclusion from the franchise, as the Supreme Court of California thought to be the case in Otsuka v. Hite, 64 Cal.2d 596, 51 Cal.Rptr. 284, 414 P.2d 412 (1966),[8] or which are of such minor significance that exclusion for their commission might raise not only a question of wisdom, as the task force of the President's

[8] Insofar as the opinion of the four member majority went beyond construction of the California Constitution and implied that the Federal Constitution forbade denial of the franchise to violators of the Selective Service Act, we think it without basis. See Note, Constitutional Law, Construction of State Disenfranchisement Rule under Equal Protection Standards, 66 Col.L.Rev. 1357 (1966)."

Crime Commission on Correction has concluded, but even a substantial constitutional question at least if we looked at § 1 of the Fourteenth Amendment alone."

Green v. *Board of Elections, supra,* at pp. 451–452.

The right to vote may include the right to be a candidate. If it does, the specter of convicted criminals voting for district attorneys or judges expounded in *Green,* becomes grossly magnified when the convicted criminals may run or rerun for those same offices. The California constitutional provisions before the Court in the instant matter, article II, section 3,[1] and article XX, section 11,[2] require the State Legislature to deny the franchise to persons "convicted of embezzlement or misappropriation of public money," "bribery, perjury, forgery, or malfeasance in office."

Even Justice Black, who wrote the holding of the Court, in *Oregon* v. *Mitchell,* 400 U.S. 112, 126–127 (1970) recognized that Section 2 of the Fourteenth Amendment might be separated from Section 1, although he did not go as far as did dissenting Justice Harlan. Justice Black said:

[1] "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state."

[2] "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

"Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Slaughter-House Cases*, 16 Wall. 36, 71–72 (1873). *While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race,*[10] see *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Hadley* v. *Junior College District*, 397 U. S. 50 (1970); see also *Kotch* v. *Board of River Port Pilots*, 330 U. S. 552 (1947), and cases cited therein, *it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection.* Nor was the Enforcement Clause of the Fourteenth Amendment

"[10] My Brother BRENNAN relies upon *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969); and *Evans* v. *Cornman*, 398 U. S. 419 (1970). These typical equal protection cases in which I joined are not relevant or material to our decision in the cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters. The Framers intended the States to make the voting age decision in all elections with the provision that Congress could override state judgments concerning the qualifications of voters in federal elections."

intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." (Emphasis added.)

Oregon v. *Mitchell*, 400 U.S. 112, 126–127 (1970).

Examination of the congressional debates relating to the adoption of the Fourteenth Amendment indicates that none of the congressional debators considered extending the franchise to convicted felons. Avins, *The Reconstruction Amendments' Debates*, 1967. When the words "except for participation in rebellion, or other crime" appear they seem merely tacked on as a matter of course and evidence the complete acceptance of the idea that States undoubtedly could disenfranchise rebels not granted amnesty and felons, an idea which no one questioned when the Fourteenth Amendment was drafted and adopted.

II. The Supreme Court of California erred when it held that the Equal Protection Clause of the Fourteenth Amendment prevents a state from disenfranchising convicted felons who are otherwise qualified to vote.

The Supreme Court of California, in *Ramirez* v. *Brown*, 9 Cal.3d 199 (1973), the case below, failed to realize that the Fourteenth Amendment, Section 2, permits disenfranchisement of persons convicted of rebellion and other crimes and, therefore, erroneously concluded that the Equal Protection Clause of the Fourteenth Amendment, Section 1, prevents a state

on equal protection grounds from disenfranchising any convicted felons who are otherwise qualified to vote.

In reaching its decision, the California Court superficially dismissed the direct holding and philosophical effect of the three major cases *contra: Green* v. *Board of Elections, supra,* 380 F.2d 445 (2d Cir. 1967), cert.den. 389 U.S. 1048 (1968); *Kronlund* v. *Honstein,* 327 F.Supp.71 (N.D. Ga. 1971); and *Beacham* v. *Braterman, supra,* 300 F.Supp. 182 (S.D. Fla. 1969), affd. without opinion, 396 U.S. 12. It rendered its decision without the benefit of a citation to *Fincher* v. *Scott, supra,* 352 F.Supp. 117 (D.C. M.D.N.C. 1972), affd. without opinion, --- U.S. ---, 36 L.Ed.2d 681, 93 S.Ct. 2151, which presumably none of the parties had knowledge of and which had, therefore, not been referred to in the briefs,[3] and it, instead, based its decision almost totally upon a nonfelon voting case for support, *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

In doing so, and in its equal protection theory reliance on *Dunn,* the Supreme Court of California neglected the caveat therein contained in *Dunn* at page 336:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis

[3] *Fincher* v. *Scott* was decided by the three-judge federal court on December 12, 1972 and affirmed by the United States Supreme Court on May 7, 1973. *Ramirez* v. *Brown* was argued in the California Supreme Court on February 5, 1973 and was decided by that Court on March 30, 1973.

with other citizens in the jurisdiction. [Citations.] This *'equal right to vote,' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.* [Citations.] But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' [Citations.]" (Emphasis added.)

It is submitted that "close constitutional scrutiny" means utilization of the entire Constitution, including Fourteenth Amendment, Section 2 as well as Section 1. Positive as well as negative aspects must be considered to give full import to the meaning of the *Dunn* case.

III. The criminal disenfranchising provisions of California Constitution, Article II, Section 3 and Article XX, Section 11 are constitutional even though application of those provisions by county clerks and registrars of voters may be in error.

As the California Supreme Court points out in its opinion in *Ramirez* v. *Brown,* the case to which certiorari is directed herein, ever since the decision in *Otsuka* v. *Hite,* 64 Cal.2d 596 (1966) county clerks and registrars of voters in each county have been deciding which specific felonies disenfranchise. While it is true that these county clerks' and registrars' decisions go in many directions, it does not follow, as the California Supreme Court incorrectly ruled, that the

California constitutional provisions under which the disenfranchising occurs are unconstitutional because those provisions are in conflict with the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

Two aspects must be considered which leave the federal constitutionality of the California Constitution provisions untrammelled.

First, is the proposition that if a clerk's or registrar's decision amounts to a denial of equal protection, that denial is a matter of *application* of the California Constitution which may be corrected if necessary. It should be noted in this connection, that *Otsuka* did not suggest that any specific *list* of crimes be formulated by county clerks, but rather that each case be considered on such factors as the nature of the crime, length of time since commission, rehabilitation of the offender, etc. Listmaking by county clerks, utilized as a pragmatic formula in the past, can be prevented by court order without destruction of the underlying State Constitution propositions which have given rise to such activity because of the *Otsuka* case.

Second, that each clerk's decision is in every case subject to a provision for judicial review upon application to the Superior Court of the county. Ever since the enactment of California's first voter registration law in 1866, Stats. 1865–66 Ch. CCLXV, p. 288, there has been an express provision for judicial review of the act of a county clerk who refuses to register any

individual. The remedy has always been quick, simple, and inexpensive.

Section 10 of the original act cited provided:

> "Persons entitled to registration, whose registration shall be refused by the County Clerk, may proceed by mandamus, before any Court having jurisdiction, against such Clerk to procure their registration, but no costs shall be allowed in such proceeding . . . ."

Today, California Elections Code section 350 still provides:

> "If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action."

Respondents Ramirez et al. did not see fit to utilize this opportunity for local judicial review in their individual cases, taking excuse in the fact that the California Supreme Court would probably hear their petition for a writ of mandate because it was filed so close to the date of the coming general election.

The situation of which Respondents Ramirez et al. complain can easily be rectified by ordering county clerks and registrars to refrain from mechanical list-making and by suggesting that convicted felons who

may initially be denied the right of the franchise by county clerks or registrars utilize the existing speedy remedy of local judicial review.

In any event, the California Legislature should be given the opportunity to define the meaning of "infamous crime" under the newly enacted amendment to California Constitution, article II, section 3.

CONCLUSION

For the foregoing reasons, the judgment and opinion of the California Supreme Court in *Ramirez v. Brown*, 9 Cal. 3d 199 (1973) should be reversed and overruled.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters
Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of California, reported at *Ramirez v. Brown*, 9 C.3d 199, 507 P.2d

1345, 107 Cal.Rptr. 137 (1973), appears in the appendix to the petition for certiorari.

JURISDICTION

The judgment of the Supreme Court of California was entered in bank on March 30, 1973, and the petition for certiorari was filed on May 26, 1973, and was granted on October 9, 1973. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

Whether Article II, Section 3, of the California Constitution, which provides that no person "convicted of an infamous crime" shall exercise the privileges of an elector in California, and Article XX, Section 11, of the California Constitution, which denies the right of suffrage to "persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes," and Sections 310, 321, 383, 389, 390, 14240, and 14246 of the California Elections Code, which implement the above constitutional disqualifications, violate the Equal Protection Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 2:

> "Representatives shall be apportioned among the several States according to their respective num-

bers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

California Constitution, Article II, Section 3:

"The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, *person convicted of an infamous crime,* nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." (Emphasis supplied.)

California Constitution, Article XX, Section 11:

"Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or *other high crimes.* The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon

from power, bribery, tumult, or other improper practice." (Emphasis supplied.)

California Elections Code:

Sections 310, 321, 350, 383, 389, 390, 14240, and 14246. (Set forth in Appendix A hereto.)

California Government Code:

Section 275. (Set forth in Appendix A hereto.)

California Penal Code:

Sections 1203.4(a), 4852.01, 4852.02, 4852.03, 4852.05, 4852.06, 4852.07, 4852.08, 4852.13, 4852.16, and 4852.17. (Set forth in Appendix A hereto.)

STATEMENT OF THE CASE

The repondents, three ex-felons, sought a writ of mandate to compel election officials to register them as voters.[1] The original jurisdiction of the California Supreme Court was properly invoked per *Jolicoeur v. Mihaly*, 5 C.3d 565, 570, footnotes 1 and 2, 488 P.2d 1, 3, 96 Cal.Rptr. 697, 699 (1971). Respondent Ramirez had been convicted in Texas of the felony "robbery by assault" in 1952 and served time in jail for that offense. In 1972 he applied to register to vote in San Luis Obispo County, California, but was refused registration by the San Luis Obispo County Clerk. Respondent Lee had been convicted of the felony of "possession of heroin" in 1955 and served

[1]Petitioner was joined as a Respondent below upon application. *Ramirez v. Brown*, supra, 9 C.3d 199, 202, and N.1, 507 P.2d 1345, 107 Cal.Rptr. 137 (1973).

time in prison for that offense. In 1972 he applied to register to vote in Monterey County, California, but was refused registration by the Monterey County Clerk. Respondent Gill had been convicted of the felony of "second degree burglary" in 1962 and 1967 and of the felony of "forgery" in 1957 and had served time in prison for those offenses. In 1972 he applied to register to vote in Stanislaus County, California, but was refused registration by the Stanislaus County Clerk. *(Ramirez v. Brown, supra,* 9 C.3d 199, 202, 507 P.2d 1345, 107 Cal.Rptr. 137 (1973).)

The California Supreme Court, relying primarily on *Dunn v. Blumstein,* 405 U.S. 330 (1972), held that

> "disfranchisement by reason of conviction of crime is no longer constitutionally permissible" and,
>
> "as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of Article II and Article XX, Section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification, violate the Equal Protection Clause of the Fourteenth Amendment." *(Ramirez v. Brown, supra,* 9 C.3d 199, 202, 216-217, 507 P.2d 1345, 107 Cal.Rptr. 137 (1973), citation omitted, footnote omitted.)

SUMMARY OF ARGUMENT

The several states may constitutionally provide for the disenfranchisement of convicted felons. Such disenfranchisement procedure, notwithstanding any ne-

cessity to promote a "compelling state interest," is excepted from the purview of the Equal Protection Clause of the Fourteenth Amendment, Section 1, by Section 2 of that Amendment which allows the states to disenfranchise. The Equal Protection Clause of Section 1 of the Fourteenth Amendment cannot prohibit what is allowed by Section 2.

ARGUMENT

I. DISENFRANCHISEMENT OF PERSONS CONVICTED OF CRIME DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The disenfranchisement of ex-felons has been universally approved in the federal courts. The argument that such disenfranchisement constitutes a denial of equal protection has been universally rejected. This Court itself has consistently held and approved lower Federal Court decisions holding that states may constitutionally disenfranchise convicted felons who might otherwise be qualified to vote.

In *Beacham v. Braterman,* 300 F.Supp. 182 (S.D. Fla. 1969), aff'd 396 U.S. 12 (1969), it was noted specifically that:

> "The initial question before the court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which effect that exclusion are valid." *(Id.* at 183.)

The same conclusion was reached in *Fincher v. Scott,* 352 F.Supp. 117 (M.D. N.C. 1972), aff'd 411 U.S. 961 (1973), where the Court noted that:

> " * * * a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause." *(Id.,* at 119.)

Examination and analysis will show the rationale behind the above noted cases is sound beyond the slightest doubt.

A. A State May Constitutionally Disenfranchise Ex-felons.

Beacham v. Braterman, supra, 300 F.Supp. 182 (S.D. Fla. 1969), involved an action brought to challenge Florida constitutional and statutory provisions pertaining to the disenfranchisement of convicted felons and the discretionary exercise of pardon power by the executive branch of the state government.[2]

A convicted felon had attempted to register to vote but was refused that right solely on the basis of his conviction and nonrestoration of civil rights. His application for a pardon and restoration of civil rights had been denied.

The challenged Florida constitutional and statutory provisions read as follows:

> "Article VI, Section 4, Florida Constitution, 1969: 'Disqualifications.—No person convicted of a felony, or adjudicated in this or any other state

[2]See California Penal Code, Sections 4852.01, 4852.02, 4852.03, 4852.05, 4852.06, 4852.07, 4852.08, 4852.13, 4852.16, 4852.17 discussed *infra* re California Procedures, set forth in Appendix A hereto.

to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.'

"Florida Statute 97.041(5) (d), F.S.A.

'Qualifications to register

The following persons are not entitled to vote:

4. Persons convicted of any felony by any court of record and whose civil rights have not been restored.'" *(Id.,* at 183.)

The *Beacham* court, giving credence to the decisions in *Green v. Board of Elections of the City of New York,* 380 F.2d 445 (2d Cir. 1967), cert. den. 389 U.S. 1048 (1968), reasoned that disenfranchisement was constitutionally permissible because the United States Supreme Court had "frequently recognized" the propriety of excluding felons from the franchise.

" * * * '[e]ven though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized—indeed put forward by the Justices to illustrate what the states *may* properly do—that such expressions cannot be dismissed as unconsidered dicta.' (Emphasis theirs.) See such expressions in *Davis v. Beason,* 133 U.S. 333, 346-347, 10 S.Ct. 299, 33 L.Ed. 637 (1890); *Estep v. United States,* 327 U.S. 114, 122, 66 S.Ct. 423, 90 L.Ed. 567 n. 13, (1946); *Tropp v. Dulles,* 356 U.S. 86, 96-97, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C.J.); *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959) (Douglas, J.); *Gray v. Sanders,* 372 U.S. 368, 380, 83 S.Ct.

801, 9 L.Ed.2d 821 (1963) (Douglas, J.); and *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 673, 675 n. 4, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (dissenting opinion of Black, J.)." *(Beacham v. Braterman, supra,* 300 F.Supp. at 184.)

What is the propriety of excluding felons from franchise? This is precisely the issue reached by *Green v. Board of Elections, supra,* 380 F.2d 445. It was noted there that:

> "* * * it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalance of organized crime. See The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice, 45-47, 187-196 (1967). A contention that the equal protection clause requires [a state] to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be." (*Id., at* 451-452.)

The California constitutional and statutory provisions now in question prevent exactly what the *Green* Court envisioned in that the California Government Code provides:

> "Unless otherwise specifically provided, every elector is eligible to the office for which he is an elector, and no person is eligible who is not such an elector." (California Government Code, Section 275.)

Thus, without the aforementioned and now questioned constitutional and statutory safeguards, California would be in precisely the position of allowing ex-felons to vote for and conceivably be elected, if otherwise qualified, to the office of legislator, sheriff, district attorney, or judge. This situation would be intolerable. (See also, *Kronlund v. Honstein,* 327 F.Supp. 71 (N.D. Ga. 1971).)

Although *Stephens v. Yeomans,* 327 F.Supp. 1182 (D. N.J. 1970), did disapprove disenfranchisement based upon a criminal conviction, the court there based its conclusion upon the inconsistent development of New Jersey voter classification. (*Id.,* at 1188; see *Kronlund v. Honstein, supra,* 327 F.Supp. 71, 73-74.) In contrast, California disenfranchisement provisions are legislatively and judicially consistent. The California Constitution of 1849 provided in Article II, Section 5, that:

> " * * * no idiot, insane person, or person convicted of any infamous crime, and no person hereafter convicted of the embezzlement or misappropriation of public money, shall ever exercise the privileges of an elector in this State."

The California Constitution of 1879, in Article II, Section 1, adopted the terms:

> " * * * no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, * * * shall ever exercise the privileges of an elector in this State; * * *."

By referendum on November 7, 1972 (Proposition 7), the voters of the State of California reenacted Article II, Section 1, of the Constitution of the State of California as Article II, Section 3, as a mandate to the legislature of this state, requiring the legislature to provide that:

> " * * * no * * * person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state."

The California Supreme Court originally defined the word "infamous" as including all felonies in *Ex Parte Westenburg,* 167 C.309, 139 P. 674 (1914), stating:

> "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies, as the punishment therefor is imprisonment in the state prison." (*Id.,* at 319, 139 P at 679.)

In 1966, *Otsuka v. Hite,* 64 C.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284, the Supreme Court of California redefined "infamous" and explained that a crime may be deemed infamous only by an inquiry focused precisely on the "nature of the crime" itself rather than solely upon the "nature of the punishment."

California disenfranchisement provisions prior to the decision in *Otsuka* thus appeared substantially similar to those of Florida upheld in *Beacham v. Braterman, supra,* 300 F.Supp. 182 (S.D. Fla. 1969).

Otsuka did not hold that the California disenfranchisement provisions were no longer applicable to convicted felons. Rather, *Otsuka* acknowledged the second portion of the *Westenburg* definition—"by reason of their nature." Thus, *Otsuka* in no way suggested that the disenfranchisement of felons was not constitutionally permitted. Following the *Otsuka* decision, disenfranchisement in California is to be based upon the "nature of the crime" itself and not simply upon the "nature of the punishment."

B. Section 2 of the Fourteenth Amendment Authorizes Disenfranchisement of Convicted Felons.

Fincher v. Scott, supra, 352 F.Supp. 117 (M.D. N.C. 1972), recently affirmed by this Court, appears to be on all fours with the position of Petitioner Richardson and virtually in direct conflict with the decision of the California Supreme Court below.

In *Fincher,* a convicted felon had attempted to register to vote, but registration was refused because he was a convicted felon whose right of citizenship had not been restored. (See California Penal Code, Sections 1203.4(a), 4852.01, 4852.02, 4852.03, 4852.05, 4852.06, 4852.07, 4852.08, 4852.13, 4852.16, 4852.17, set forth in Appendix A hereto.) Relief from the disenfranchisement was sought before a three-judge district Court through a declaratory and injunctive action

against the applicable statutory and constitutional provisions of North Carolina that deprived convicted felons of the right to vote.[3]

In dismissing the action and denying the relief sought, Circuit Judge J. Braxton Craven, speaking for the unanimous Court, most effectively argues the position of Petitioner herein. He states:

> "[The North Carolina] provisions are attacked as being a denial of equal protection in violation of U. S. Const. amend. XIV, §1, * * *.
>
> * * *
>
> "A contention that provisions of state law like those before us violate the equal protection clause also was made in *Green v. Board of Elections,* 380 F.2d 445 (2d Cir. 1967).
>
> 'Plaintiff places heaviest weight on the equal protection clause of the Fourteenth Amendment, relied upon in such landmark decisions as the apportionment cases, *Baker v. Carr,* 369

[3]As noted by the Court in *Fincher v. Scott,* 352 F.Supp. 117, 118:

> "The Constitution of North Carolina, art. VI, §2(3) provides:
> "'Disqualification of felon: No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to rights of citizenship in the manner prescribed by law.'
> "N.C. Gen. Stat. §163-55(3) provides.
> "'The following classes of persons shall not be allowed to register or vote in this State:
> "'(3) Persons who have been convicted, or who have confessed their guilt in open court, upon indictment, of any crime the punishment for which now or may hereafter be imprisonment in the State's prison, unless he shall have had his rights of citizenship restored in the manner prescribed by law.'"

U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663] (1962); *Gray v. Sanders,* 372 U.S. 368 [83 S.Ct. 801, 9 L.Ed.2d 821] (1963), and *Reynolds v. Sims,* 377 U.S. 533 [84 S.Ct. 1362, 12 L.Ed.2d 506] (1964); and the voter qualification cases, *Carrington v. Rash,* 380 U.S. 89 [85 S.Ct. 775, 13 L.Ed.2d 675] (1965) and *Harper v. Virginia Board of Elections,* 383 U.S. 663 [86 S.Ct. 1079, 16 L.Ed.2d 169] (1966). But none of those decisions intimates that the states are without power to continue their historic exclusion from the franchise of persons convicted of all or certain types of felonies. Even though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized —indeed put forward by the Justices to illustrate what the states may properly do—that such expressions cannot be dismissed as unconsidered dicta.' 380 F.2d at 451.

"We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause. * * *"

* * *

"* * * Putting it positively, we think §1 must be read in light of §2, and, so read, denial of the franchise to felons is specifically excepted from the Equal Protection Clause contained in §1.

"While it may be more desirable from a correctional point of view to give felons the right to vote, Comment, 50 N.C.L.Rev. 903, 909-10 (1972), we are convinced the states are not constitutionally required to do so." (*Id.,* at 118-119.)

It has been consistently acknowledged by the United States Supreme Court that the states may disenfranchise for crime.

In *Davis v. Beason,* 133 U.S. 333 (1890), it is stated:

> "In our judgment [a statute] * * * which provides that 'no person * * * convicted of treason, felony or bribery in this territory * * * is permitted to vote at any election * * *' is not open to any constitutional or legal objection." (*Id.,* at 133 U.S. 333, ... 33 L.Ed. 637, 641.)

In *Trop v. Dulles,* 356 U.S. 86 (1958), this Court stated that:

> "A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise." (*Id.,* at 96-97. Footnotes omitted.)

And in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), it was stated that:

> "Residence requirements, age, previous criminal record [citation] are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters." (*Id.,* at 51.)

Section 2 of the Fourteenth Amendment provides:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion *or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis supplied.)

Section 2 of the Fourteenth Amendment is also reflected in the United States Code.

> "Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, Article 14, Section 2, except for participation in the rebellion *or other crime*, the number of Representatives apportioned to such State shall be reduced in the proportion in which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State." (17 Stat. 29, 2 U.S.C. Section 6. Emphasis supplied.)

Petitioner submits that Section 2 of the Fourteenth Amendment expressly allows a state to disenfranchise. Petitioner's position is supported by the federal Courts and sound reason.

In 1873, in *United States v. Anthony,* 24 Fed. Case No. 14,459, p. 829 (C.C. N.D. N.Y. 1873), the Court spoke of disenfranchisement for crime as allowed by Section 2 and said:

> "This view is assumed in the second section of the Fourteenth Amendment, which enacts, that if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants." (*Id.,* at 831.)

The importance of Section 2 of the Fourteenth Amendment is noted in *Green v. Board of Elections of the City of New York, supra,* 380 F.2d 445 (2d Cir. 1967). There, the Court determined that:

> "The framers of the [Fourteenth] Amendment * * * could hardly have intended the general language of §1 to outlaw discrimination which §2 expressly allowed without the penalty of reduced representation. * * * We see nothing in the language or in history to support [the] sug-

gestion that 'other crimes' meant only a crime connected with the rebellion. The court's rejection of Mr. Justice Harlan's position that §2 is the only portion of the Fourteenth Amendment dealing with voting rights, see *Reynolds v. Sims*, supra, 377 U.S. at 589, 84 S.Ct. 1362, 12 L.Ed.2d 506, in no way indicates it would deny that §1 of the Amendment cannot be fairly read to prohibit a discrimination which §2 expressly permits —especially in the light of the Justices' frequent and consistent statements approving voting disqualification for felony." (*Id.*, at 452. Footnote omitted.)

And in *Kronlund v. Honstein, supra,* 327 F.Supp. 71 (N.D. Ga. 1971), the Court found that:

"In determining that there has been a violation of * * * Fourteenth Amendment rights, the exclusionary language of Section 2 of the Fourteenth Amendment must be considered. This court concurs in the opinion expressed on this matter by Judge Friendly in *Green v. Board of Elections of New York,* 380 F.2d 445 (2d Cir. 1967). In that case, it was suggested that the Section 2 language may be dispositive of the question of whether the states can pass disenfranchisement laws. This is so because although Section 2 provides a penalty for denying qualified persons the right to vote, at the same time, it specifically excepts from its coverage, state action limiting the right to vote 'for participation in rebellion or other crime.' " (*Id.*, at 74.)

The California Supreme Court below, in holding that disenfranchisement of convicted felons was indeed a violation of the Equal Protection Clause, er-

roneously based its decision upon *Dunn v. Blumstein,* 405 U.S. 330 (1972).

Dunn notes that:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." (*Id.,* at 335.)

This Court, citing its decision in *Kramer v. Union Free School District,* 395 U.S. 621 (1969), then went on to state in *Dunn* that:

> "* * * if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' [Citations.]" (*Dunn v. Blumstein, supra,* 405 U.S. at 337, original emphasis; see also, *Bullock v. Carter,* 405 U.S. 134 (1972), *Kramer v. Union Free School District, supra,* 395 U.S. 621 (1969).

It is clear that *Dunn* dealt with a challenge to state durational residence laws as a ban to the registration of voters. It is submitted that *Dunn* and other equal protection cases dealing with apportionment (see *Baker v. Carr,* 369 U.S. 186 (1962), apportionment statute affecting a debasement of votes; *Gray v. Sanders,* 372 U.S. 368 (1963), unit system as vote counting basis in statewide primary election; *Reynolds v. Sims,* 377 U.S. 533 (1964), apportionment of both houses of bicameral state legislature on population

basis) and voter qualifications (see *Carrington v. Rash,* 380 U.S. 89 (1965), denial of franchise to United States Army serviceman; *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966), payment of poll tax) have no applicability to the case at bench.

Although Petitioner believes California indeed has a "compelling state interest" for disenfranchising former felons (see California Government Code, Section 275, discussed *supra; Green v. Board of Elections, supra,* 380 F.2d 445; *Kronlund v. Honstein, supra,* 327 F.Supp. 71), even in the absence of such an "interest," disenfranchisement is *specifically excepted from the Equal Protection Clause by Section 2 of the Fourteenth Amendment.*

The correctness of the decision below is thus open to serious question. The California Supreme Court has held unconstitutional, on the basis of the Equal Protection Clause of the Fourteenth Amendment, Section 1, various California constitutional and statutory provisions relating to disenfranchisement for crime without due regard for the declaration of Section 2 of that Amendment which excepts such disenfranchisement from the purview of the Equal Protection Clause.

Any examination of voting rights and denial thereof based upon the Equal Protection Clause of Section 1 of the Fourteenth Amendment must take into account the express exceptions of Section 2 of that Amendment. Section 1 cannot prohibit what is allowed by Section 2. The latter section speaks of male inhabitants, twenty-one years old, citizens, who have not

participated in rebellion "or other crime." It is submitted that, as women's suffrage and the eighteen-year-old vote were provided for by constitutional amendment, only such constitutional amendment can enfranchise aliens, rebels, and felons. (See U. S. Const. Amend. XIX, XXVI.)

II. THE STATUTORY SCHEME FOR RE-ENFRANCHISEMENT IN CALIFORNIA INSURES EQUAL PROTECTION AND DUE PROCESS OF THE LAW.

The California Supreme Court below found unconstitutional Sections 310, 321, 383, 389, 390, 14240, and 14246 of the *California Elections Code*. The Elections Code sections provide, respectively, for an affidavit of registration (Section 310), a form for the affidavit of registration (Section 321), grounds for cancelation of registration (Section 383), cancelation of registration upon criminal conviction (Section 389), a record of criminal conviction to be kept by the county clerk and furnished to the registrar of voters (Section 390), grounds for oral challenge of an elector (Section 14240), and procedure for challenge on the ground of felony conviction or conviction of misappropriation of public money (Section 14246). These sections implement Article II, Section 3, and Article XX, Section 11, of the California Constitution which were also found to violate the Equal Protection Clause of the Fourteenth Amendment.

California, however, is one of the many states and territories that also provide judicial or administrative procedures whereby an ex-felon can seek to have his right to the franchise reinstated.[4]

California Elections Code, Section 350, was the procedure followed for the judicial determination in the case of *Otsuka v. Hite, supra,* 64 C.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284 (1966). That section provides:

> "If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action."

Otsuka provided that not every felony conviction results in disenfranchisement. (See discussion, *supra.*) The county clerk or registrar of voters, with the aid of legal counsel, if desired, should determine whether the crime in question is infamous. Any determination adverse to the prospective voter may then be contested in the Superior Court. The total spectrum of the *judicial* process would become available.

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[4]Forty-three states and the territories of the District of Columbia, Guam, Virgin Islands, Puerto Rico, and the Trust Territory of the Pacific Islands, by statute or constitutional provision, disenfranchise persons convicted of a "felony," "infamous" or specified crimes. Only the states of Alabama, Alaska, New Hampshire, New York, and Oklahoma do not have an automatic, judicial, or administrative procedure which reinstates the franchise. (See Appendix B hereto for the constitutional and statutory disenfranchisement provisions of the several states and territories.)

Additionally, California provides that an ex-felon may, by a *judicial-administrative* process, seek restoration of the franchise. This procedure is set forth in the California Penal Code at Sections 4852.01-4852.21. (See Sections 4852.01, 4852.02, 4852.03, 4852.05, 4852.06, 4852.07, 4852.08, 4852.13, 4852.16, 4852.17 set forth in Appendix A hereto.

The prospective voter files a notice of intention to petition for a certificate of rehabilitation with the county clerk (Section 4852.01), he then waits a specified period of time (Sections 4852.02, 4852.03), obeys all laws (Section 4852.05), and, at the conclusion of that specified time, files a petition for rehabilitation in the Superior Court (Section 4852.06). After proper notice (Section 4852.07), a judicial proceeding is held wherein the petitioner may be represented by appointed or selected counsel (Section 4852.08). If the Court finds that the prospective voter has "demonstrated by his course of conduct his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship, the Court shall make an order declaring that the petitioner has been rehabilitated and recommending that the governor grant a full pardon to the petitioner." (California Penal Code, Section 4852.13.) The governor may then issue a full pardon (Section 4852.16), which entitles the petitioner to all civil and political rights including "the right to vote." (Section 4852.17.)

The above judicial and judicial-administrative procedures enable an ex-felon to regain the franchise. The disenfranchisement provisions of the California

Constitution and the California Elections Code are thus not the end of the road. The franchise is not forever lost to an ex-felon. Rather, he need only seek registration or pardon. By this statutory scheme, the California legislature has attempted to protect the state from the perils noted in *Green v. Board of Elections, supra,* 380 F.2d 445, and yet insure that all ex-felons have the opportunity to seek reenfranchisement.

> "A state has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims." (*Kronlund v. Honstein, supra,* 327 F.Supp. at 73.)

California has attempted to preserve the integrity of her electoral process, but in a manner so as not to deny equal protection and due process of law.

When the prospective voter has completed his term of incarceration and parole, and, through compliance with either the Elections or Penal Code scheme, indicates to society that he is no longer "destructive of society's aims," as witnessed by the original commission of the felony, his right to the franchise is restored.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that the judgment and opinion of the California Supreme Court below should be reversed.

Respectfully submitted,

DUNCAN M. JAMES,
District Attorney of the County of Mendocino,
Counsel for Petitioner.

JONATHAN M. LEHAN,
Deputy District Attorney,
Of Counsel.

Dated, November, 1973.

(Appendices Follow)

Appendix A

CALIFORNIA ELECTIONS CODE

§ 310. Affidavit of registration; contents
Text of section operative until January 1, 1974

The affidavit of registration shall show:

(a) The facts necessary to establish the affiant as an elector.

(b) Affiant's name at length, including his given name, and a middle name or initial, or if the initial of his given name is customarily used, then the initial and middle name. The given name of a woman shall be preceded in all cases by the designation of Miss or Mrs.

(c) Affiant's place of residence and post office address with sufficient particularity to identify it and to determine affiant's voting precinct.

(d) Affiant's social security number. If his social security number is not immediately available, the affiant may mail the number to the county clerk on an addressed post card provided for that purpose. Notwithstanding this section or Section 321, no person shall be denied the right to register because of his failure to furnish his social security number.

(e) Affiant's occupation.

(f) The country or state of affiant's birth.

(g) If foreign born, how citizenship was acquired, whether by:

(1) Citizenship of father.

(2) Treaty or act of Congress.

(3) Order of a court of naturalization.

(4) Marriage to a citizen.

(5) Naturalization of a parent or husband.

The place where the affiant became a citizen shall be stated except in the case of citizenship acquired by citizenship or naturalization of parents, by treaty, or by act of Congress. When citizenship depends upon the citizenship or naturalization of a parent or husband, the name of the parent or husband shall be stated.

(h) Whether the elector is able to read the Constitution in the English language and to write his name, and whether the elector has any physical disability by reason of which he cannot mark the ballot, in which case the nature of such disability shall be stated.

(i) Whether the affiant has been convicted of a felony which disqualifies him from voting. (Not all felony convictions disqualify him from voting.)

The affiant shall sign the affidavit with his name at length, including given name, middle name or initial and middle name, and if he is unable to write he shall sign with a mark or cross, and the person before whom the affiant is made shall insert the date of the affidavit, which shall be the date of the jurat. (Amended by Stats.1932, c. 108, p. 788, § 1; Stats.1963, c. 729, p. 1742, § 1; Stats.1969, c. 402, p. 933, § 1; Stats. 1969, c. 1543, p. 3136, § 1; Stats.1970, c. 148, p. 392, § 1, urgency, eff. May 29, 1970.)

§ 310. Affidavit of registration; contents

Text of section operative January 1, 1974

The affidavit of registration shall show:

(a) The facts necessary to establish the affiant as an elector.

(b) Affiant's name at length, including his given name, and a middle name or initial, or if the initial of his given name is customarily used, then the initial and middle name. The given name of a woman shall be preceded in all cases by the designation of Miss or Mrs.

(c) Affiant's place of residence; residence telephone number, if furnished; and post office address with sufficient particularity to identify it and to determine affiant's voting precinct. Notwithstanding this section or Section 321, no person shall be denied the right to register because of his failure to furnish his telephone number, and shall be so advised by the registration clerk or deputy registrar.

(d) Affiant's social security number. If his social security number is not immediately available, the affiant may mail the number to the county clerk on an addressed post card provided for that purpose. Notwithstanding this section or Section 321, no person shall be denied the right to register because of his failure to furnish his social security number, and shall be so advised by the registration clerk or deputy registrar.

(e) Affiant's occupation.

(f) The country or state of affiant's birth.

(g) If foreign born, how citizenship was acquired, whether by:

(1) Citizenship of father.

(2) Treaty or act of Congress.

(3) Order of a court of naturalization.

(4) Marriage to a citizen.

(5) Naturalization of a parent or husband.

The place where the affiant became a citizen shall be stated except in the case of citizenship acquired by citizenship or naturalization of parents, by treaty, or by act of Congress. When citizenship depends upon the citizenship or naturalization of a parent or husband, the name of the parent or husband shall be stated.

(h) Whether the elector is able to read the Constitution in the English language and to write his name, and whether the elector has any physical disability by reason of which he cannot mark the ballot, in which case the nature of such disability shall be stated.

(i) Whether the affiant has been convicted of a felony which disqualifies him from voting. (Not all felony convictions disqualify him from voting.)

The affiant shall sign the affidavit with his name at length, including given name, middle name or initial, or initial and middle name, and if he is unable to write he shall sign with a mark or cross, and the person before whom the affidavit is made shall insert the date of the affidavit, which shall be the date of the jurat. (Amended by Stats.1963, c. 108, p. 788, § 1;

Stats.1963, c. 729, p. 1742, § 1; Stats.1969, c. 402, p. 933, § 1; Stats.1969, c. 1543, p. 3136, § 1; Stats.1970, c. 148, p. 392, § 1, urgency, eff. May 29, 1970; Stats.1972, c. 1053, p. ——, § 3, operative Jan. 1, 1974.)

§ 321. Form of affidavit

Text of section operative January 1, 1974

Subject to the provisions of this chapter, the body of the affidavit of registration shall be substantially in the following form:

For transfer or change or name	I am registered under the name of _____ in _____ Assembly District, _____ Precinct in said county and request that said registration be canceled.

AFFIDAVIT OF REGISTRATION

State of California, }
County of (_____) } ss.

The undersigned affiant, being duly sworn, says: I will be at least 21 years of age at the time of the next succeeding election, a citizen of the United States, and a resident of the state one year, of the county 90 days, and of the precinct 54 days next preceding such election, and will be an elector of this county at the next succeeding election.

1. I am not now registered as a voter in this state. (If now registered in this county under this or another name, mark out word "not" and fill out transfer clause at top. If now registered in another county, mark out word "not" and execute a separate affidavit of cancellation before registering.)

2. My full name is ..... (including Christian or given name, and middle name or initial and in case of women, the prefix Miss or Mrs.).

3. My residence is ....., between ..... and ..... Streets, ...floor, Room ....., and my residence telephone number is ..... (If telephone number is not given, write or stamp "None" or "Declines to state" as appropriate.)

4. My occupation is .....

5. My height is ..... feet ..... inches.

6. I was born in .....
(State or country)

7. I acquired citizenship by (underline method of acquiring citizenship):

a. Decree of court.

b. Father's naturalization. / Mother's naturalization.

c. Citizenship of father.

d. Marriage to a citizen.

e. Naturalization of my husband.

f. Act of Congress.

g. Treaty.

Where (city / state) .....

My (father's / husband / mother's) name is (was) .....

(To be filled out when citizenship depends on citizenship or naturalization of parent or husband.)

8. I can ..... read the Constitution in the English language; I can ..... write my name; I am entitled to vote by reason of having been on October 10, 1911, an elector.

I can ..... mark my ballot by reason of ..... (State physical disability, if any.)

9. I intend to affiliate at the ensuing primary election with the ..... Party. (If affiliation is not given, write or stamp "Declines to state.")

10. I have not been convicted of a felony which disqualifies me from voting. (Not all felony convictions will disqualify you from voting.)

11. My social security number is ..... (may be omitted).

.....

(Affiant sign here.)

Residence .....

Subscribed and sworn to before me this ..... day of ....., 19....

.....

County Clerk.

By.....

Deputy County Clerk.

Assembly District .....

Post office address is ..... Precinct .....

Rural Route No. ..... Box No. .....

(Amended by Stats.1963, c. 108, p. 789, § 2; Stats. 1963, c. 729, p. 1743, § 2; Stats.1969, c. 402, p. 934,

§ 2; Stats.1969, c. 1543, p. 3137, § 2; Stats.1970, c. 148, p. 393, § 2, urgency, eff. May 29, 1970; Stats.1971, c. 1760, p. 3804, § 1, urgency, eff. Dec. 16, 1971; Stats. 1972, c. 1053, p. ....., § 4, operative Jan. 1, 1974.)

§ 350. Court action; joinder of plaintiffs

If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action. (Stats. 1961, c. 23, p. ....., § 350.)

§ 383. Grounds for cancellation

The county clerk shall cancel the registration in the following cases:

(a) At the request of the person registered.

(b) When the insanity of the person registered is legally established.

(c) Upon the production of a certified copy of a subsisting judgment of the conviction of the person registered of any infamous crime or of the embezzlement or misappropriation of any public money.

(d) Upon the production of a certified copy of a judgment directing the cancellation to be made.

(e) Upon the death of the person registered.

(f) If the person registered has not voted at the preceding general election unless the clerk, prior to the time he has canceled the registration, has had written notice from the voter that the voter still

resides and has not removed from the residence address stated in the affidavit of registration, in which case he shall not cancel the registration, but it shall remain permanent unless canceled for any other cause enumerated in this section. If the county clerk has already canceled the affidavit of registration, then upon receipt of the proper information within 60 days after mailing the notice provided for in Section 387, he shall restore the affidavit of registration to the files. * * *

(Amended by Stats.1965, c. 26, p. 903, § 1; Stats. 1965, c. 451, p. 1762, § 2; Stats.1969, c. 810, p. 1633, § 2.)

§ 389. Criminal conviction; cancellation of registration

The county clerk shall, in the first week of September in each year, examine the records of the courts having jurisdiction in case of infamous crimes and the embezzlement or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have been finally convicted of an infamous crime or of the embezzlement or misappropriation of public money.

As used in this section, "county clerk" does not include "registrar of voters." (Stats.1961, c. 23, p. —, § 389.)

§ 390. Record of criminal conviction

The county clerk, on the basis of the records of courts in the county having jurisdiction of such of-

fenses, shall furnish to the registrar of voters in a county where there is a registrar of voters, before the first day of September of each year, a statement showing the names of all persons convicted of infamous crimes or of the embezzlement or misappropriation of public money during the year prior to that first day of September, whose convictions have become final. The registrar of voters shall, during the first week of September in each year, cancel the affidavits of registration of such persons. The county clerk shall certify the statement under the seal of his office.

As used in this section "county clerk" does not include "registrar of voters." (Stats.1961, c. 23, p. —, § 390.)

§ 14240. Grounds for oral challenge; posting eligibity information

A person offering to vote may be orally challenged within the polling place only by a member of the precinct board upon any or all of the following grounds:

(a) That he is not the person whose name appears on the register.

(b) That he has not been a resident of the state one year next preceding the election.

(c) That he * * * is not a citizen of the United States * * *.

(d) That he has not been a resident of the county for 90 days preceding the election.

Asterisks * * * indicate deletions by amendment

Underline indicates changes or additions by amendment

(e) That he has not been a resident of the precinct for 54 days next preceding the election.

(f) That he has voted that day.

(g) That he has been convicted of a felony.

(h) That he has been convicted of the embezzlement or misappropriation of public money.

On the day of the election no person, other than a member of a precinct board or other official responsible for the conduct of the election, shall challenge any voter or question him concerning his qualifications to vote.

If any member of a precinct board receives, by mail or otherwise, any document or list concerning the residence or other voting qualifications of any person or persons, with the express or implied suggestion, request, or remand that such person or persons be challenged, he shall first determine whether the document or list contains or is accompanied by evidence constituting probable cause to justify or substantiate a challenge. In any case, before making any use whatever of such a list or document, the member of the precinct board shall immediately contact the clerk, charged with the duty of conducting the election, and describe to him the contents of such document or list and such evidence, if any, received bearing on voting qualifications. The clerk shall advise the members of the precinct board as to the sufficiency of probable cause for instituting and substantiating the challenge and as to the law as herein provided, relating to hearings and procedures for challenges by members of the precinct board and determination thereof by a precinct board.

The clerk may, if necessary, designate a deputy to receive and answer inquiries from precinct board members as herein provided.

No person shall post or cause to have posted any poster, bill, or placard containing any information concerning eligibility to vote to be displayed on the day of the election within 500 feet of the entrance to a polling place.

(Amended by Stats.1963, c. 1560, p. 3143, § 1; Stats. 1965, c. 1908, p. 4417, § 1; Stats.1967, c. 208, p. 1334, § 1; Stats.1971, c. 1760, p. 3807, § 2, urgency, eff. Dec. 16, 1971.)

§ 14246. Oath of criminal conviction

If the challenge is on the ground that the person challenged has been convicted of * * * a felony or that he has been convicted of the embezzlement or misappropriation of public money, he shall not be questioned, but the fact may be proved by the production of an authenticated copy of the record or by the sworn testimony of two witnesses. (As amended Stats. 1965, c. 1908, p. 4419, § 4.)

CALIFORNIA GOVERNMENT CODE

§ 275. Electors, eligibility to office

Unless otherwise specifically provided, every elector is eligible to the office for which he is an elector, and no person is eligible who is not such an elector. (Stats.1943, c. 134, p. 902, § 275.)

§1203.4 Discharged probationer; change of plea or vacation of verdict; dismissal of charge; release from penalties and disabilities; application; pleading prior conviction in prosecution for subsequent offenses

(a) * * * In any case in which a defendant * * * has fulfilled the conditions of * * * probation for the entire period * * * of probation, or has been discharged * * * prior to the termination of the period * * * of probation, or in any other case in which a court, in its discretion and the interest of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time * * * after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be relased from all penalties and disabilities resulting from the offense of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that, in any subsequent prosecution of the defendant for

any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021.

This subdivision shall apply to all applications for relief under this section which are filed on or after * * * November 23, 1970.

(b) Subdivision (a) of this section does not apply to any misdemeanor which is within the provisions of subdivision (b) of Section 42001 of the Vehicle Code, or to any infraction.

(Amended by Stats.1970, c. 539, p. 1035, § 1; Stats 1971, c. 333, p. 667, § 1.)

§ 4852.01 Notice of intention to apply for certificate of rehabilitation and pardon; application of Chapter

(a) Any person convicted of a felony who has been released from a state prison or other state penal institution or agency in California, whether discharged on completion of the term for which he was sentenced or released on parole prior to May 13, 1943, who has not been incarcerated in a state prison or other state penal institution or agency since his release and who presents satisfactory evidence of a three-year residence in this State immediately prior

to the filing of the petition for a certificate of rehabilitation and pardon provided for by this chapter, may at any time file with the clerk of the county in which he resides a notice of intention to petition for such certificate and pardon, and may at any time after his discharge from custody and termination of his parole file such petition.

(b) Any person convicted of a felony who, on May 13, 1943, was confined in a state prison or other institution or agency to which he was committed and any person convicted of a felony after that date who is committed to a state prison or other institution or agency may file with the clerk of the county in which he resides, at any time after his discharge from custody or release on parole, a notice of intention to apply for a certificate of rehabilitation and pardon in accordance with the provisions of this chapter.

(c) This chapter shall not apply to persons convicted of misdemeanors; to persons who have served time in county jails only; to persons serving a mandatory life parole; to persons committed under death sentences; or to persons in the military service.

(Added by Stats.1943, c. 400, p. 1922, § 1, eff. May 13, 1943. Amended by Stats.1955, c. 708, p. 1197, § 1.)

§ 4852.02 Procedure after filing notice of intention; change of residence; second notice

(a) Requirements

(a) A person who files a notice of intention pursuant to Section 4852.01 of this code shall within 10 days thereafter:

(1) Service of notice

* * * (1) Serve upon the chief of police of the city in which he resides, or upon the sheriff of the county if he resides in unincorporated territory, a certified copy of the notice of intention filed with the county clerk.

(2) Photograph, fingerprints, information

* * * (2) Give to the peace officer his photograph and fingerprints, full information concerning his residence and occupation, and any other information concerning his conduct and manner of living which the peace officer may require.

(3) Agreement to supervision

* * * (3) Agree to submit to the supervision of the peace officer and conform to any reasonable requirements by the peace officer during the period of rehabilitation.

(b) Commencement of rehabilitation period

(b) If any of the requirements of paragraphs (1) to (3) inclusive, of subdivision (a) are not performed until after the 10-day period specified by this section, the period of rehabilitation shall commence when there is compliance with paragraph (1) of subdivision (a). This subdivision shall apply to notices of intention filed before or after the effective date of the amendment of this section enacted at the 1970 Regular Session of the Legislature.

Asterisks * * * indicate deletions by amendment

Underline indicates changes or additions by amendment

(c) Change of residence; second notice

(c) However, if after the filing and serving of the notice the person filing it changes his residence to another county he shall file with the county clerk of such other county a notice of intention similar in form and substance to that previously filed, which second notice shall state the date and place where the previous notice was filed and the name and title of the peace officer upon whom the same was served. A certified copy of such second notice shall be served upon the chief of police of the city into which he has moved, or upon the sheriff of the county if the changed residence is in unincorporated territory, and the person filing the notice shall give to such peace officer the information described in this section.

(d) Transmittal

(d) Upon the filing of such second notice the county clerk shall transmit notice of that fact to the county clerk with whom the previous notice was filed and said last-mentioned county clerk shall transmit the said previous notice to the county clerk with whom the second notice was filed.

(e) Order to furnish data

(e) Upon request of the county clerk with whom the second notice is filed, the district attorney shall move and the superior court shall order that the county clerk with whom the original notice was filed furnish such material and data in his possession relevant to

the case to the county clerk with whom the second notice was filed.
(Amended by Stats.1970, c. 1150, p. 2034, § 1.)

§ 4852.03 Period of rehabilitation; determination of period

The period of rehabilitation shall not begin * * * to run until there has been compliance with paragraph (1) of subdivision (a) of Section 4852.02. For * * * purposes of this chapter, * * * the period of rehabilitation shall constitute three years' residence in the county or counties in which such notice or notices are filed, plus a period of time determined by the following rules:

(1) To the three years there shall be added 30 days for each year of the term prescribed by statute as the maximum penalty of imprisonment for the crime of which the petitioner was convicted. When the maximum term includes the fractional part of a year, the period of rehabilitation shall be extended by a proportional part of the 30-day period.

(2) For the purposes of this chapter, crimes with maximum penalties of life improisonment shall be regarded as carrying a maximum penalty of imprisonment for 50 years.

(3) Where the petitioner is convicted of multiple crimes, the maximum penalty for the purpose of computing the period of rehabilitation shall be determined as follows: (a) if the sentences are made to run concurrently, the greatest maximum penalty prescribed

by statute for any of such crimes shall constitute the maximum penalty; (b) if the sentences are made to run consecutively, the sum of the maximum penalties prescribed by statute for all such crimes shall constitute the maximum penalty, but in no case shall the maximum penalty exceed the period prescribed for life imprisonment under subparagraph (2) of this section. The trial court hearing the application for the certificate of rehabilitation may, if the defendant was ordered to serve consecutive sentences, order that his statutory period of rehabilitation be extended for an additional period of time which when combined with the time already served will not exceed the period prescribed by statute for the sum of the maximum penalties for all such crimes.

(4) Any person who was discharged after completion of his term or was released on parole before May 13, 1943, is not subject to the periods of rehabilitation set forth in these rules.

Unless and until the period of rehabilitation, as stipulated herein, has passed, the petitioner shall be ineligible to file his petition for a certificate of rehabilitation with the court. Any certificate of rehabilitation which is issued and under which the petitioner has not fulfilled the requirements of this chapter shall be void.

A change of residence does not interrupt the period of rehabilitation prescribed by this section if the second notice of intention required by Section 4852.02 of this code is filed.

(Amended by Stats.1970, c. 1150, p. 2035, § 2)

§ 4852.05 Conduct during rehabilitation period

During the period of rehabilitation the person shall live an honest and upright life, shall conduct himself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land.

(Added by Stats.1943, c. 400, p. 1923, § 1, eff. May 13, 1943.)

§ 4852.06 Petition for ascertainment and declaration of rehabilitation and for certificate; time for filing; prerequisites

Except as provided in subdivision (a) of Section 4852.01, after the expiration of the minimum period of rehabilitation applicable to him (and, in the case of persons released upon parole, after the termination of parole), each person who has filed a notice of intention pursuant to Section 4852.01 and has complied with the requirements of Sections 4852.02 and 4852.05 may file in the superior court of the county in which he then resides a petition for ascertainment and declaration of the fact of his rehabilitation and of matters incident thereto, and for a certificate of rehabilitation under this chapter. No such petition shall be filed until and unless the petitioner has continuously resided in this State, after leaving prison, for a period of not less than three years immediately preceding the date of filing the petition and until and unless the same period has elapsed since the service of the original notice as required by Section 4852.02 upon the appro-

priate peace officer in the county in which the petition is filed.

(Added by Stats.1943, c. 400, p. 1923, § 1, eff. May 13, 1943. Amended by Stats.1945, c. 1072, p. 2069, § 1; Stats.1955, c. 708, p. 1199, § 4.)

§ 4852.07 Petition; notice of filing; officials to whom given; notice of time of hearing; time for service

The petitioner shall give notice of the filing of the petition to the district attorney of the county in which the petition is filed, to the chief of police and sheriff upon whom a certified copy of the notice of intention was last served, to the district attorney of each county in which the petitioner was convicted of a felony, and to the office of the Governor, together with notice of the time of the hearing of the petition, at least 30 days prior to the date set for such hearing.

(Added by Stats.1943, c. 400, p. 1923, § 1, eff. May 13, 1943.)

§ 4852.08 Counsel; private; public defender; adult probation officer; assigned counsel

During the proceedings upon the petition, the petitioner may be represented by counsel of his own selection; if he has no such counsel he shall be represented by the public defender, if there is one in the county, and if there is none, by the adult probation officer of the county or if in the opinion of the Court the petitioner needs counsel, the Court shall assign counsel to represent him.

(Added by Stats.1943, c. 400, p. 1924, § 1, eff. May 13, 1943.)

§ 4852.13 Certificate of rehabilitation; finding; contents; filing

If, after hearing, the Court finds that the petitioner has demonstrated by his course of conduct his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship, the Court shall make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. Such order shall be filed with the clerk of the Court, and shall be known as a certificate of rehabilitation. The certificate shall show the date on which the original notice of intention to apply for a certificate was filed.

(Added by Stats.1943, c. 400, p. 1925, § 1, eff. May 13, 1943. Amended by Stats.1955, c. 708, p. 1199, § 5.)

§ 4852.16 Pardon; certificate as application; issuance; recommendation

The certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to Section 1 of Article VII of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court.

(Added by Stats.1943, c. 400, p. 1925, § 1, eff. May 13, 1943.)

§ 4852.17 Report of certificate of rehabilitation or pardon; rights restored by pardon; exceptions

Whenever a person is issued a certificate of rehabilitation or granted a pardon from the Governor under this chapter, the fact shall be immediately reported to the * * * Department of Justice by the court, Governor, officer, or governmental agency by whose official action the certificate is issued or the pardon granted. The * * * Department of Justice shall immediately record the facts so reported on the former criminal record of the person, and transmit such facts to the Federal Bureau of Investigation at Washington, D.C. When the criminal record is thereafter reported by said * * * department, it shall also report the fact that the person has received a certificate of rehabilitation, or pardon, or both.

Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) the right to vote; (2) the right to own, possess, and keep any type of firearm that may lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 12001 and 12021 of the Penal Code shall apply, if the person was ever convicted of a felony involving the use of a dangerous weapon.

(Amended by Stats.1972, c. 1377, p. ....., § 75.)

Asterisks * * * indicate deletions by amendment

Underline indicates changes or additions by amendment

Appendix B

Disenfranchisement for Felonies	Disenfranchisement for Infamous Crimes	Disenfranchisement for Specified Crimes	No Disenfranchisement
Ala. Const. Art. VIII, § 182[5]; Code Ala. Tit. 17 § 15	Ark. Const. Art. V, §§ 12 & 13; Tit. 3 Elect. 3-101	Alas. Const. Art. V, §§ 1 & 2[3]; AS 15.05.030	Ind. Const. Art. 2, § 8
Ariz. Const. Art. VII, § 2; A.R.S. 16-101	Cal. Const. Art. II, § 1 (11-7-72 amend. Art. II, § 3); Elec.Code § 310 *et seq.*	Colo. Const. Art. VII, § 7[3]; C.R.S. 3 39-3-1	Maine
			Massachus
Conn. Const. Art. VI, § 3; C.G.S.A. 9-46	Iowa Const. Art. II, §5; I.C.A. Tit. 4 § 48.31(5)	Ga. Const. Art. II, § 2, ch. 2-8, § 2-801; Ga. Code Ann. 34-621	Mich. Con Art. III, §
Del. Const. Art. V, §2[4]; 15 Del. C. 1701	Md. Const. Art. I, § 2; ART 33, 3-4(b)(5)	Miss. Const. Art. XII, § 241; 23-5-35	Pennsylva
Fla. Const. Art. VI, § 4[4]; FSA 97.041	N.Y. Const. Art. III, § 3[5]	N.H. Const. Pt. I, Art. 11[5]	Tenn. Con Art. IV, §
Hawaii Const. Art. II, § 2[3]; HRS Crim. § 716-2	Ohio Const. Art. V, § 4; 2961.01	Utah Const. Art. IV, § 6	Vermont
Idaho Const. Art. VI, § 2; I.C.A. 34-403	R.I. Const. Art. XXIV 17-1-2		
Ill. Const. Art. III, § 2[4]; S.H.A. ch. 46, 3-4	Wash. Const. Art. VI, § 3[4]; RCWA 29.07.070(14)		
Kan. Const. Art. V, § 2[3]; K.S.A. 22-3722	Wyo. Const. Art. VI, § 6; 22.1-2(k)		
Ky. Const. § 145; KRS 128.020			
La. Const. Art. VIII, § 6; LSA-R.S. 18:42			

Disenfranchisement for Felonies	Disenfranchisement for Infamous Crimes	Disenfranchisement for Specified Crimes	No Disenfranchisement
Minn. Const. Art. VII, § 2[4]; M.S.A. 200.02(25)			
Mo. Const. Art. VIII, § 2; V.A.M.S. 111.021			
Mont. Const. Art. IX, § 2[3]; 23-2701			
Neb. Const. Art VI, § 2[4]; R.R.S. 1943 § 32-1040			
Nev. Const. Art. II, § 1; N.R.S. Tit. 24 293.540			
N.J. Const. Art. II, § 7[4]; N.J.S.A. 19:4-8			
N.M. Const. Art. VII, § 1; 3-1-4			
N.C. Const. Art. VI, § 2; 163-55-(3)			
N.D. Const. Art. V, § 127; 16-01-04			
Okla. Const. Art. III, § 1[5]; 26 Okl. St. Ann. 93.1			
Ort. Const. Art. II, § 2[4]; ORS 137.250			
S.C. Const. Art. II, § 7; 23-62			
S.D. Const. Art. VII, § 8[4]; S.D.L.C. 1967, 12-3-1			

Disenfranchisement for Felonies	Disenfranchisement for Infamous Crimes	Disenfranchisement for Specified Crimes	No Disenfranchisement
Tex. Const. Art. VI, § 1; Elec.Code 5.01			
Va. Const. Art. II, § 1; 24-1-41			
W.Va. Const. Art. IV, § 1[4]; 3-1-3			
Wisc. Const. Art. III, § 2; W.S.A. 6.03(1)			

[1]The District of Columbia[4] and the territories of Guam,[3] Virgin Islands, Puerto Rico, and the Trust Territories of the Pacific[4] disenfranchise for felonies.

[2]Permissive language in state constitution allowing for disenfranchisement without implementing statutes.

[3]Disenfranchisement only while in prison. The franchise is automatically restored on release from prison. (Four states.)

[4]Automatic reenfranchisement at the completion of parole, probation, sentence, or other. (Ten states.)

[5]No automatic, judicial, or administrative procedure to restore the franchise. (Five states.)

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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Respondents.

Interest of Amicus Curiae.*

The American Civil Liberties Union of Southern California is an organization dedicated to the preservation of the rights guaranteed by the Bill of Rights. One of the most vital of these, not only to the individuals involved, but to the body politic, is the right to vote. Of

*Per Rule 42(2) of this Court, letters of consent have been filed with the Clerk.

concern also is society's apparent inability to afford ex-felons an atmosphere conducive to their rehabilitation and reintroduction into the mainstream of life once they have paid the penalty demanded for their crime. Prohibitions against ex-felons voting, like prohibitions against them from holding jobs, continue to impress upon such persons that they are second-class citizens and discourage and impede their ability to again be gainful members of society. Because, in amicus' view, the ex-felon voting prohibition has no reasonable relation to any interest which the State may be entitled to protect and certainly is not necessary to protect any compelling interest of the State, amicus files this brief. It is designed to show that archaic concepts about keeping ex-felons forever down can no longer be indulged.

ARGUMENT.

I.

Disfranchisement of Persons Convicted of Crime When Measured by Contemporary Standards Constitutes a Denial of the Equal Protection of the Laws.

Petitioner, the Registrar of Voters of Mendocino County, California, asks this Court to reverse the decision of the Supreme Court of California so that, as she puts it, she may perpetuate the "historic exclusion of felons from the franchise." Petitioner's Brief at 7.

History shows that in Roman times, as well as among preliterate tribes, the offender was banished from society, sometimes so that gods would be placated and on other occasions to prevent the endless retaliation by the kin of his victim.[1] Today, "civil death" statutes exist in many states, including California,[2] as a reminder that Roman civilization, its needs and eccentricities have not passed away after more than 2,000 years.

Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change, however.[3] In overruling a previous decision which had up-

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[1]Geis, "Law, Politics and Ex-Offenders in the Correctional Process" in OFFENDERS AS A CORRECTIONAL MANPOWER RESOURCE (Joint Commission on Correctional Manpower and Training, Washington, D.C. 1968), 27 [hereinafter "Geis"].

[2]Penal Code § 2600.

[3]As Justice Hufstedler of the Ninth Circuit Court of Appeals aptly put it,

> "Earlier in our constitutional history laws disenfranchising persons convicted of crime may have been immune from attack but constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber." *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (1972).

held the State's use of the poll tax as a condition to the exercise of the franchise, this Court stated,

> "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory we have never been confined to the historic notions of equality any more than we have restricted due process to a fixed catalog of what was at a given time deemed to be the limits of fundamental rights." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1966).

Protection of the electoral process was first given as a justification for disfranchisement in *Washington v. State of Alabama*, 75 Ala. 582, 585 (1884), in which the court stated:

> "The manifest purpose is to preserve the purity of the ballot box . . . the presumption is that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage. . . ."

The presumption that a person convicted of a crime, even a crime involving "great moral turpitude", constitutes a threat to the purity of the ballot box breaks down in the face of studies indicating widespread, even ubiquitous, criminal conduct on the part of our whole society, aberrant of enforcement procedures, the absence of any proven relationship between election fraud and franchisement of ex-convicts, and the salutary effect on ex-convicts of integrating them into the mainstream of society.

A study by Wallerstein and Wyle revealed that of 17,000 middle-class adults interviewed, 99% admitted

to having committed offenses punishable by at least one year of imprisonment. About two-thirds of the men and one-third of the women admitted to having committed felonies.[4] There does not appear to be a correlation between economic status and delinquency, although there are differences in type of offense.[5] Two independent field studies found that 100% of the college students studied had been involved in offenses serious enough to justify court action.[6] The President's Commission on Law Enforcement and Administration of Justice reported that six out of ten children in our population will be arrested and nine out of ten will have committed an offense for which they could be arrested.[7] It has been estimated that in 1960 there were about 50 million Americans with criminal records, 10 million of whom have records for crimes that are considered serious.[8] While it is true that many offenders become known because they persistently violate the law, nevertheless, the findings of these studies suggest that criminality is a normal condition in American society while noncriminality is deviant. Thus, if Petitioner's cause is upheld, those who are entitled to vote may be reduced to a "discreet and insular minority".

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[4]Wallerstein & Wyle, "Our Law-Abiding Lawbreakers", PROBATION 107-112 (1947).

[5]Nye, FAMILY RELATIONSHIPS AND DELIQUENT BEHAVIOR (1958).

[6]Cohen, DELINQUENT BOYS (1955); Porterfield, "Delinquency and Its Outcome in Court and College", AMERICAN JOURNAL OF SOCIOLOGY, 199-208 (1943).

[7]President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 55 (1967).

[8]Reuben, CRIME AND JUVENILE DELINQUENCY, A RATIONAL APPROACH TO PENAL PROBLEMS, 150-151 (2d Ed. 1961).

As the California Supreme Court pointed out, there is not a shred of evidence to support the presumption that ex-convicts today pose a greater threat to the integrity of the ballot box than those persons admittedly qualified to vote. *Ramirez v. Brown*, 9 Cal.3d 199, 214, 107 Cal.Rptr. 137 (1973). To the contrary, there is strong evidence for the proposition that allowing the ex-convict to vote has no effect at all on incidence of election crime but does have a positive effect on the reduction of crime in general.

In addition to the State statutes which we understand will be cited in Respondent's Brief, several model acts have been proposed which would restore civil rights, including the right to vote, to those convicted of crime immediately upon successful completion of their sentence or parole.[9] Among the supporters of this proposal are the National Council on Crime and Delinquency, the National Probation and Parole Association, and the President's Commission on Law Enforcement and Administration of Justice. Such organizations can hardly be accused of "radical" philosophies or being "soft on crime."

In their treatise, PRINCIPLES OF CRIMINOLOGY (1955), Sutherland and Cressy state that to allow offenders to remain in general society, "is the best situation in which to develop character and at the same time to receive assistance in adapting themselves to the

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[9]See, Commission on Uniform State Law, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, 295 (1964); MODEL PENAL CODE 306.6 (Proposed Official Draft 1962); National Council on Crime and Delinquency, "Annulment of a Conviction of Crime", CRIME AND DELINQUENCY, 97 (1962); National Probation and Parole Association, STANDARD PROBATION and PAROLE ACT, §§ 12 and 27 (1955).

conditions of life, so that they will not be so impotent in struggling against the conditions which produce the delinquency." *Id.* at 440. On the other hand, denying offenders access to the norms of community living has been found to deter the offender's successful integration into society and to contribute to antisocial behavior. Reinhardt, "The Discharged Prisoner and the Community", 21 FED. PROBATION 47 (1957); E. Johnson, CRIME, CORRECTION AND SOCIETY, 527 (1968); Edmundson, "Civil Rehabilitation", 27 CAN. B. REV. 1091 (1949); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 7 (1967).

> "The community environment has crucial influence on the possibilities of the offender's successful integration . . . apart from his own efforts, successful adjustment is patterned, implemented, or obstructed by forces exerted by the socio-cultural environment. . . . When the community is reluctant to accept the offender back, the possibility is reduced that he will make a successful readjustment." Johnson, CRIME, CORRECTION AND SOCIETY, 169 (1968).

Restoration of the franchise would not only benefit the individual offender but offenders in society as a whole. Given the franchise, offenders would be able to attract much more attention from the political system to the condition in our prisons and the problems of ex-convicts in their attempt to successfully integrate into society.[10] Indeed, it can be legitimately argued that the ex-convict's vote is worthy of unusually stringent

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[10]Geis, n. 1, *supra* at 26.

constitutional protection because in the past there has been a pattern of discrimination against him by the very legislators for whom he is not allowed to vote.[11] And, as the President's Commission on Law Enforcement noted:

> "Convicted persons are generally subjected to numerous disabilities and disqualifications which have little relation to the crime committed, the person committing it, or, consequently, the protection of society. They are often harsh out of all proportion to the crime committed."[12]

Accordingly, in light of the above, it cannot be soundly contended that the State has met its heavy burden of justifying the disenfranchisement of this considerable portion of the population.

II.

The California Scheme for Re-Enfranchisement Does Not Satisfy the Requirements of Equal Protection or Due Process of Law.

A. California's Pardon Procedure Does Not Satisfy the Equal Protection Objections to Disfranchisement of Ex-Convicts.

Petitioner contends that California's pardon procedure answers the objections of ex-convicts who are denied the right to vote. Petitioner's Brief at 21-24. Amicus submits that the pardon procedure does not answer these objections for the following reasons.

First, if the State has no Constitutionally valid basis for denying the vote to those convicted of crimes, no

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[11]Du Fresne, "The Case for Allowing 'Convicted Mafiosi to Vote for Judges': Beyond Green v. Board of Elections of New York City", 19 DePAUL L. REV. 112 (1969).

[12]TASK FORCE REPORT, *supra* at 88.

scheme for the restoration of the right to vote can excuse the initial denial of that right.

Second, the pardon procedure has serious constitutional defects of its own.

Under the California system a person convicted of a felony may, after discharge from custody or release on parole, file notice of his intention to apply to the Superior Court for a certificate of rehabilitation and pardon. Penal Code[13] Section 4852.01. The application itself can be made upon a showing that the individual has resided in the county in which he is applying for a period of three years plus thirty days for each year of the term prescribed by statute as the maximum penalty for the crime of which he was convicted. Section 4852.03. In addition, the applicant must show that he has lived an upright and honest life. Section 4852.05. If he meets the above criteria, the court shall issue him a certificate of rehabilitation. Section 4852.13. The certificate of rehabilitation does not by itself restore civil rights. It only acts as an application to the Governor for a full pardon. Section 4852.16. The Governor may then grant a pardon based on the Superior Court's certificate of rehabilitation or he may order a further investigation. In no case may the Governor grant a pardon to one twice convicted of a felony except upon the recommendation of the California Supreme Court. Section 4852.16; California Constitution, Article IV, Section 8.

California's pardon procedure is not reasonably related to the determination of an ex-con's fitness to

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[13]All future references are to the Penal Code, unless otherwise noted. The sections referred to herein are set forth in the Appendix to Petitioner's Brief, pp. xiv-xxiii.

vote. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court struck down a Tennessee law that required a prospective voter to be a resident of the state for one year and of the county for 90 days. The Court stated, "Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." *Id.*, 405 U.S. at 360. While the mere passage of time may provide some evidence as to the offender's rehabilitation, in light of the close scrutiny which must be given voting restrictions, a period of three or more years seems excessive. Evidence of the offender's conduct in prison or on parole is immediately available as is a description of the circumstances which led up to the commission of the particular crime. The testimony of friends, relatives, employers, ministers, and parole officers is always available. It should be left to the ex-convict to present this evidence to the registrar of voters or to the court whenever he feels he can make a sufficient showing of rehabilitation.

The pardon procedure, insofar as it affects the fundamental right to vote, is unconstitutionally vague. There are no standards by which the Governor is to act in determining whether to grant or deny a pardon. No time limit is imposed within which the Governor must act. While Governors have traditionally and properly exercised broad discretion in the granting of pardons, that discretion must be limited when a fundamental right is involved. *Cf., Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). A state law which required that prospective voters interpret, to the satisfaction of the registrar, provisions of the State constitution was

struck down by this Court precisely because it vested an unfettered discretion in the state to pick and choose among its residents those whom it would allow to vote. Mr. Justice Black, speaking for eight members of the Court stated:

> "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

Obviously, what the State cannot do through its registrars it cannot do through its Governor.

B. California's Failure to Afford Ex-Convicts a Hearing on Their Present Qualification to Vote Constitutes a Denial of Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution.

The California Constitution, as amended in 1972, provides that,

> "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." Petitioner's Brief at page 3.

As the California Supreme Court noted in *Otsuka v. Hite*, 64 Cal.2d 596, 51 Cal.Rptr. 284 (1966), if the standard to be used in denying the right to vote is conviction of an "infamous crime," then the disqualification of a voter must rest on the facts in his particular case, including the nature of the crime, the circum-

stances of its commission, the period of time which has elapsed since its commission, and the extent of the offender's subsequent rehabilitation. (64 Cal.2d 605, 611.)

The determination that a crime is an infamous one is made at the administrative level by the local registrar of voters. Since the law requires that the determination of an ex-convict's right to vote be made at an administrative level and that such determination involves questions of law and fact,[14] due process requires that ex-convicts be afforded a hearing at the administrative level. *Cf., Interstate Commerce Commission v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913):

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing is denied."

It is now well settled that, when a governmental agency withdraws previously conferred benefits from an individual, it may do so only in accordance with due process standards. See generally, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *Green v. McElroy*, 360 U.S. 474 (1959). The fundamental requirement of due process is the opportunity to be heard. *Willner v. Comm. on Character and Fitness*, 373 U.S. 96 (1963); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (concurring opinion) (1951); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This opportunity to be heard must be afforded at a meaningful time and

[14]See, *Otsuka v. Hite*, 64 Cal.2d 596, 611, 51 Cal.Rptr. 284 (1966).

in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1967). The question of what constitutes a hearing at a meaningful time in a meaningful manner depends for answer on the nature of the governmental function involved. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Cases requiring that administrative hearings be held before agency action becomes final are increasingly common. See, *e.g., Goldberg v. Kelly, supra; Escalera v. New York City Housing Authority*, 425 F.2d 653 (2d Cir. 1970); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Java v. California Dep't of Human Resources Dev.*, 317 F.Supp. 875 (N.D. Cal. 1970), *aff'd on other grounds*, 402 U.S. 121 (1971). Starting with *Londoner v. Denver*, 210 U.S. 373 (1908), a long line of cases hold that, when a governmental agency acts in an adjudicatory capacity, a trial type hearing must be held.

The eventual availability of judicial review is no substitute for prior administrative hearing.[18] *Southern Railway Co. v. Virginia*, 290 U.S. 190, 199 (1933). Such a prior hearing is the best protection against arbitrary action by the governmental agencies involved. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 302 (1937); *Dixon v. Alabama State Bd. of Education, supra*, 294 F.2d at 157. It also gives the agency the opportunity to clear up any confusion as to the facts of the case and to discover and correct its own errors—thus, helping to alleviate the occasion for judicial review. *McGee v. United States*, 402 U.S.

[18]California Elections Code § 350 provides, "If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the Superior Court to compel his registration. . . ."

479 (1971). Most importantly, such a hearing provides the reviewing court in an action under Section 350 of the Elections Code with the grounds for the agency's decision. In circumstances where an individual is deprived of a fundamental right without hearing, without the opportunity to know the evidence against him, and without the agency stating the reason for the denial, no contestant could have fair opportunity for review by the court. There would be nothing to show the grounds upon which the administrator acted. He alone would be cognizant of the mental processes which begot his opinion. *Southern Ry. Co. v. Virginia, supra,* 290 U.S. at 198.

Accordingly, petitioner's contention that the procedures for re-enfranchisement satisfy the equal protection and due process requirements, is not well taken.

Conclusion.

The case before this Court must be considered in light of society's whole experience, including the development of constitutional law doctrines and the evolvement of the science of conducting elections. The California Supreme Court considered these factors and found that the continued disfranchisement of ex-convicts was unconstitutional. This Court should affirm the judgment of that Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, Individually and as a representative of the class of all other County Clerks and Registrars of Voters, *Petitioner,*

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether California's denial of the right to vote to former felons who have completed their terms of incarceration and parole, and are otherwise qualified

to vote, violates the equal protection clause of the Fourteenth Amendment.

2. Whether inconsistent interpretation and application of California's voting laws by 58 individual county registrars denies potential voters equal protection of the law.

STATEMENT OF THE CASE

Article II, Section 3 of the California Constitution denies suffrage to those who have been convicted of "infamous crimes." In 1966, the California Supreme Court, as a matter of state constitutional law, definitively construed Article II, Section 3[1] and related statutory provisions as excluding from the voting rolls only those persons who had been convicted of crimes which threaten "the purity of the ballot box." *Otsuka v. Hite,* 64 Cal.2d 596 (1966). Since that time, California's 58 Registrars of Voters have established 58 separate and often inconsistent policies as to which of California's several hundred felonies were "infamous crimes" and which were not.

Pursuant to his responsibilities to apply election laws in a uniform manner, California's Secretary of State conducted a survey in early 1972 of the registration practices of California's 58 County Registrars. A chart indicating the results of the Secretary's survey appears beginning at page 32 of the Single Ap-

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[1]In the November, 1972 general election, Article II, Section 1 of the California Constitution was re-enacted by referendum as Article II, Section 3. The California Supreme Court found that the re-enactment made no substantive change in the provisions at issue in this case. *Ramirez v. Brown,* 9 Cal.3d 199, 204-05 (1973).

pendix, previously filed.[2] The following are clear examples of the geographic disparity in the application of California's election laws that existed at the time respondents petitioned the California Supreme Court for relief:

[A] A person convicted of burglary who had been released from prison and parole was registered and permitted to vote if he lived in Alameda, Contra Costa, Fresno, Marin, San Joaquin, Sonoma, or Yuba Counties. He was denied registration if he lived in El Dorado, San Bernardino, or Santa Cruz Counties.

[B] Similarly, at least eight counties (Yolo, Sonoma, Santa Clara, San Francisco, San Diego, Sacramento, Contra Costa, and Alameda) would have registered a robbery ex-felon whereas seven others (Siskiyou, Santa Cruz, San Joaquin, San Bernardino, Orange, Monterey, and Los Angeles) would not.

[C] Twenty-one counties indicated they would register an ex-felon convicted of possession of dangerous drugs, but Butte and San Joaquin would not. San Bernardino would register one convicted of possession but not one convicted of use. Orange, San Bernardino, and Santa Cruz would register one convicted of possession or use but not sale of drugs. At least nine of the others register all three.

[D] Butte County indicated that it would not register a person convicted of drunk driving

[2]The Single Appendix is hereinafter referred to as "App."

causing death but would register one convicted of wife beating. San Bernardino would not register one convicted of "sex charges" but would register an ex-felon convicted of child molesting. San Diego County would register one convicted of first degree murder but not one convicted of non-support. Los Angeles County would not register an ex-felon whose crime was statutory rape but would register one who was guilty of forcible rape. Santa Clara permitted registration if the crime was prostitution, but San Bernardino would not.

[E] Several counties registered those convicted of embezzling, forgery, or insufficient funds. (Alameda, Colusa, Contra Costa, Marin, Riverside, Sacramento, Santa Clara and San Francisco). Santa Clara would register one convicted of income tax evasion but Los Angeles would not. San Joaquin registered one convicted of transporting counterfeiting tools but denied the franchise to another guilty of issuing bad checks.

[F] The responses of Sonoma and San Joaquin Counties indicated that they had a "two-conviction" rule. There, persons convicted of two non-infamous crimes, such as assault and armed robbery, would be refused registration because two non-infamous crimes were apparently equivalent to one infamous crime. (App. pp. 13-15)

Respondent Abran Ramirez is a 44-year old Spanish-speaking farmworker who has lived in San

Luis Obispo County, California, for ten years. He and his wife have five children. Twenty-three years ago—when he was 21—he was convicted in Texas of a felony entitled "robbery by assault." The offense arose out of an argument in a restaurant. At his trial he was without counsel and pleaded guilty on the advice of the judge. After serving only three months in jail, he was released on parole. His parole successfully terminated over 11 years ago. He applied to register to vote on February 15, 1972, at the San Luis Obispo County Clerk's office and was denied registration on the ground he had been convicted of a felony. (App., p. 6) Respondent Ramirez would have been registered to vote if he lived in any one of at least 17 other California Counties. (App., p. 34)

Respondent Albert Sang Lee, a resident of Salinas, California, is 55 years old, married, and has four children. Nineteen years ago he was convicted of drug possession. After serving two years in prison he was paroled. His parole successfully terminated 15 years ago. He applied to register to vote on March 17, 1972, and was denied registration by the county clerk on the sole ground of his felony conviction. (App., p. 7) Respondent Lee would have been registered to vote if he lived in any one of at least eight other California Counties. (App., p. 33)

Respondent Lawrence Gill is 46 years old and lives with his wife and four children in Stanislaus County, California. He is employed by the Gallo Winery. He was convicted in 1952 and 1967 of second degree burglary, and in 1957 of forgery. All of his convictions arose from attempts to obtain money to maintain a

heroin addiction. He served his time in prison and successfully completed parole and terminated his drug dependency. On April 18, 1972, he applied to vote at the office of the county registrar of voters and was refused registration on the sole ground of his prior felony conviction. (App., p. 7) Respondent Gill would have been registered to vote if he lived in Alameda, Contra Costa, or Marin County. (App., pp. 34-35)[3]

On May 31, 1972, respondents Ramirez, Gill, and Lee individually and on behalf of a class of approximately 100,000 disfranchised California former felons, sought an original writ of mandate in the California Supreme Court to require California's chief election officer, the Secretary of State, and all of California's 58 County Registrars to register those ex-felons whose terms of incarceration and parole had expired. The original jurisdiction of the California Supreme Court was invoked because of the state-wide impact of the questions involved and the then impending national elections. *Ramirez v. Brown,* 9 Cal. 3d 199, 202-203 (1973).

Respondents presented the California Supreme Court with data showing the geographical disparities in the application of the "infamous crime" standard, with evidence demonstrating the complete absence of opportunity for fraud under current election practices and with data showing that no election-related

[3]Other named Respondents are three non-profit organizations whose members are directly adversely affected by ex-felon disfranchisement, and the California League of Women Voters, a non-profit California corporation whose purpose is to promote active citizen participation in government. (App., pp. 8-9)

felonies had been reported in California since 1919. (App., pp. 4-24 and Exhibits to Petition for Writ of Mandate.) After reviewing the evidence presented, the California Supreme Court held in a unanimous decision that the disfranchisement of ex-felons who were not then incarcerated or on parole was no longer constitutionally permissible in California. *Ramirez v. Brown, supra.*

On May 26, 1973, the County Clerk and Registrar of Voters for Mendocino County, Viola N. Richardson, filed a Petition for a Writ of Certiorari from the judgment in *Ramirez v. Brown, supra.* This Court granted Certiorari on October 9, 1973.

SUMMARY OF ARGUMENT

1. In 1849, when California first adopted its constitutional provision denying the franchise to those convicted of "infamous crimes," abuse of the electoral process was rampant. There was no procedure for registration of voters, and every adult male could, and often did, vote more than once. The buying and selling of votes was common; prospective voters were often rounded up like cattle and delivered to the polling places at the appropriate time to place their pre-marked ballots in the ballot box. The more than 100 years that have passed since that time have seen extensive changes in California's election procedures —to such an extent that vote fraud is a virtual impossibility today. The exclusion of former felons from the franchise may have once been arguably justifiable

in order to protect the purity of the ballot box, but today it serves no interest of the state; and, indeed, contravenes the interest the state has in effective and complete rehabilitation of persons who have completed their prison terms and parole. California's disfranchisement of ex-felons, therefore, violates the equal protection clause of the Fourteenth Amendment.

2. There is nothing in the legislative history of Section 2 of the Fourteenth Amendment or the decisions of this Court to give weight to the contention that Section 2 affects or controls the ambit of the Equal Protection Clause as it is applied to the right to vote. Section 2 was intended to be no more than a specific, supplementary remedy for Congress to enforce in the event newly emancipated blacks were denied the franchise. In *Oregon v. Mitchell,* 400 U.S. 112 (1970), this Court declined to give to Section 2 the very construction urged by Petitioner in this case. In *Oregon,* this Court upheld a federal law passed pursuant to the equal protection clause of the Fourteenth Amendment preventing the states from denying the franchise in federal elections to those persons eighteen years of age despite the specific language of Section 2 stating that no penalty shall be suffered by the states for denial of suffrage to persons under twenty-one years of age.

3. In 1966, the California Supreme Court definitively construed the phrase "infamous crime" in the California Constitution to include only those crimes which threaten the purity of the ballot box. *Otsuka v. Hite,* 64 Cal. 2d 596 (1966). In the seven years

since that decision, the registrars of voters in the fifty-eight California counties have determined on an ad hoc basis who, in their individual opinions, will be denied the right to vote. A survey conducted by the California Secretary of State, the chief election officer, showed such disparity of practice by county registrars that practically no two counties are alike. This unbridled discretion vested in county registrars, resulting in 58 different standards of eligibility to vote, in itself violates the equal protection clause of the Fourteenth Amendment.

ARGUMENT

I.

CALIFORNIA CONSTITUTIONAL PROVISIONS AND STATUTES THAT DENY THE RIGHT TO VOTE TO AN ENTIRE CLASS OF POTENTIAL ELECTORS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Petitioners Must Demonstrate that California's Disfranchisement of Former Felons is Based Upon a Compelling State Interest and is the Least Restrictive Method Available to Protect that Interest.

Neither Petitioner nor Amicus Curiae has met directly the merits of the equal protection clause argument presented by petitioners below and followed by the California Supreme Court in *Ramirez v. Brown, supra.* A brief analysis of this Court's opinions in recent voting rights cases, however, clearly demonstrates that the California Supreme Court correctly traced, perceived and applied the current standards of equal protection to California's exclusion of former felons from the franchise.

Since this Court's decisions in *Carrington v. Rash*, 380 U.S. 89 (1965)[4], *Harper v. Virginia State Board of Electors*, 383 U.S. 663 (1966)[5], *Kramer v. Union Free School District*, 395 U.S. 621 (1969)[6], and *Cipriano v. City of Houma*, 395 U.S. 701 (1969)[7], it has become clear that a statutory denial of the "fundamental" right to vote may not be justified by any state on the premise that there exists a rational relationship between the statute and its purpose. Rather, as this Court held without dissenting opinion in *Evans v. Cornman*, 398 U.S. 419 (1970)[8], again in *City of Phoenix, Arizona v. Kolodziejski*, 399 U.S. 204 (1970)[9], and unanimously in *Bullock v. Carter*, 405 U.S. 134 (1972)[10], complete disfranchisement of a

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[4]In *Carrington*, when Texas servicemen were found to be excluded from the franchise solely on the basis of their military status, the Court held that the statutory creation of such a disfranchised class imposed an "invidious discrimination in violation of the Fourteenth Amendment." 380 U.S. at 96.

[5]In *Harper*, the absolute denial of the franchise to those persons who could not pay a poll tax was held unconstitutional.

[6]In *Kramer*, the Court surveyed voter disqualifications based upon status as a non-parent or non-property owner, and held that such statutes violated the Equal Protection Clause.

[7]In *Cipriano*, a *per curiam* decision reiterated the reasoning of *Kramer* and struck down the Louisiana State Constitutional provision which disfranchised a class of non-property owners.

[8]In *Evans*, this Court unanimously held that Maryland's complete denial of the vote in all local, state, and federal elections to persons who lived within the state's geographical boundaries, but on a federal enclave, was unconstitutional.

[9]During the 1970 term, in *Kolodziejski*, this Court ruled that a city could not disfranchise persons who sought to vote in elections to approve the issuance of general obligation bonds solely on the basis of their status as non-property owners.

[10]In *Bullock*, the Court found that an exorbitant Texas filing fee system had a real and appreciable impact on the rights of potential candidates and voters, and on that basis held that it contravened the Equal Protection Clause.

class of potential voters must be founded upon an *actual,* compelling state interest.

In the last case of a denial of voting rights decided by this Court prior to the California Supreme Court's decision below, Tennessee's durational residence laws were declared violative of the equal protection clause of the Fourteenth Amendment. *Dunn v. Blumstein,* 405 U.S. 330 (1972)[11]. In the *Dunn* case the State of

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[11]Subsequent to the California Supreme Court decision in *Ramirez v. Brown,* 9 Cal.3d 199, 107 Cal.Rptr. 137 (1973), this Court has rendered two decisions involving voting rights. Both cases dealt with time limits requiring voters to indicate party affiliation in order to be eligible to vote in primary elections. In both cases the State asserted that the purpose of the time limit in question was the prevention of "raiding," *i.e.* the practice of wholesale changes in registration in an attempt to cause the election of an opposition party candidate who would be easy to defeat in the general election. In *Rosario v. Rockefeller,* ____ U.S. ____, 93 S.Ct. 1245 (1973) the Court found that petitioners had "concededly" failed to register in time for the primary for no apparent reason. *Id.* at p. 1250. There was nothing in the New York statutory scheme which prevented the particular petitioners in that case from registering and voting in the primary and there was therefore not found to be any violation of the Equal Protection Clause. The subsequent case, *Kusper v. Pontikes,* ____ U.S. ____, 42 U.S. Lw.Wk. 4004, November 19, 1973, involved an Illinois statutory scheme which operated to bar change of registration from one party to another until a voter had completely abstained from a primary election. Thus under the Illinois scheme there was no opportunity for the petitioner to register for the party of his choice in the primary election. This Court held that Illinois law unconstitutional.

These two primary preference cases are discussed by the Court principally as freedom of association cases since they involve the voter's choice of party affiliation. In *Rosario* the Court takes care to reaffirm and distinguish its prior decisions in *Carrington, Kramer, Cipriano, Kolodziejski, Dunn* and *Evans:*

> "In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. In *Carrington,* for instance, the Texas Constitution disabled all servicemen from voting in Texas, no matter how long they had lived there. In *Kramer,* residents who were not property owners or parents were completely pre-

Tennessee argued that its durational residence requirements were essential to "insure purity of the ballot box"—the same interest California asserted in this case.

This Court in *Dunn*, overruled an earlier *per curiam* affirmance of a lower court decision upholding Maryland's durational residence requirements in *Druedling v. Devlin*, 380 U.S. 125 (1965), stating:

> "[A]s devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that

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cluded from voting in school board elections. In *Cipriano* and *Kolodziejski*, the States prohibited non-property owners from ever voting in bond elections. In *Evans*, Maryland refused to permit residents at the National Institute of Health, located within its borders, ever to vote in state elections. And in *Dunn*, Tennessee totally disenfranchised newly arrived residents, *i.e.*, those who had been residents of the State less than a year or residents of the county less than three months before the election." 93 S.Ct. at 1249.

Petitioners in *Ramirez*, however, like those voters in *Carrington*, *Kramer*, *Cipriano*, *Kolodziejski*, *Dunn*, *Evans*, and *Kusper*, were completely denied registration.

durational residence requirements are necessary to further a compelling state interest." 405 U.S. at 360.

The decision in *Dunn* graphically demonstrates the test which a restriction on voting must meet. A state imposed limitation on, or denial of, voting rights may not rest merely upon a showing that its function is derived from either a rational basis or from a compelling governmental interest. Nor can a state simply show that the denial is rooted in historical precedent. To constitutionally limit the right to vote, a state must have a compelling interest, show the necessity of the means employed to promote it, and demonstrate those means constitute the least restrictive alternative available. *Dunn v. Blumstein, supra,* at 342-343.

B. The Reasons for Total Disfranchisement Asserted by Petitioner Do Not Constitute a Compelling State Interest and the Methods Chosen Are Not the Least Restrictive Available.

Under the aforementioned decisions of this Court, California may properly attempt to justify its franchise exclusion of former felons by virtue of a compelling state interest. Maintenance of "the purity of the ballot box" has been the articulation of that interest.[12] As *Kramer, supra,* and its progeny make

[12]The California Supreme Court adhered to its determination in *Otsuka v. Hite,* that the purpose of California's disfranchisement was to deter election fraud. *Ramirez, supra,* at 206. However, the only "interest" actually asserted below by the State was the claimed need to continue the disfranchisement of persons currently incarcerated or on parole. In both Respondent Secretary of State Brown's pleadings (See Record for Return to Alternative Writ and Points and Authorities) and at oral argument (A transcript of

clear, a state may not rest a voting exclusion on evils merely "theoretically imaginable." *Williams v. Rhodes,* 393 U.S. 23, 33 (1968). Those bases found more theoretical than real will not support wholesale disfranchisement of a class of potential voters. *Evans v. Cornman,* 398 U.S. 419 (1970). Petitioner has not placed one fact before this Court or the California Supreme Court to support that claimed interest. Nor has petitioner disputed one factual allegation made by respondents. (App. pp. 44-51.)

Recent decisions make it clear that a criminal conviction does not permit a cavalier inference of moral unfitness for all purposes and for all times. The California Supreme Court in *People v. Beagle,* 6 C.3d 441, (1970), in limiting the use of felony convictions in the impeachment of witnesses, quoted with approval Mr. Chief Justice Burger's observation in *Gordon v. United States,* 383 F.2d 936 (D.C. Cir. 1967) that all felony convictions may not be treated equally:

> "The nearness or remoteness of the prior conviction is also a factor of no small importance.

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which appears in Appendix A hereto), the Attorney General agreed that ex-felons who had completed their terms of incarceration and parole should not be denied the right to vote. Appendix A at pp. i-iv. Furthermore, on behalf of himself and the Secretary of State, he admitted to the California Supreme Court during oral argument that the state-wide disparity in the application of California's voting laws was clearly unconstitutional. He stated:

> "I think there's no question you have the geographical denial of equal protection on that ground." (Appendix A, p. iv).

The Attorney General concluded his oral argument by indicating to the California Supreme Court that if it was going to limit its decision to restoring the right to vote to the class of former felons not presently incarcerated or on parole, he would agree with such a decision. Appendix A, p. ix. The court in *Ramirez v. Brown, supra,* n. 18 at 217, noted the limitation of its decision to exactly that class of former felons.

> Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness." 383 F.2d at 940-41.

In spite of the fact that the duty to come forward with empirical data rests upon petitioner and she has failed to do so, respondents have not been content simply to rely on this absence of evidence to prevail. Rather, respondents have presented ample evidence to show that:

(1) Election procedures have been modernized to the point that present-day opportunity to manipulate the process is practically non-existent. As a result, voter fraud, vote buying and other election crimes simply no longer occur in California.

(2) Half the states now provide, in one form or another, automatic restoration of the franchise to former felons who complete parole. Those states have not reported any consequent rise in the incidence of election law violations, or any other harmful effect of including former felons among those entitled to vote.

(3) California has over 70 separate criminal statutes dealing with the elective process and these provide the State with ample protection against abuse.

(4) The whole purpose of rehabilitation is to re-integrate the former felon fully into society. It makes absolutely no sense to punish perpetually persons who have served their sentence and finished

parole by denying them the right to vote, the right most fundamental to citizen participation in society.

1. California's current election practices and regulatory statutes adequately protect the electoral process.

A century ago the State of California may have feared justifiably that unscrupulous individuals could corrupt the electoral process through the misuse of the right to vote. Whatever the original basis for the State's disfranchisement of ex-felons, it must remain a matter for conjecture in the silence of the historical record. California's Constitutional Convention of 1849 adopted the "infamous crime" exclusion without debate or inquiry; the 1870 convention transferred the exclusion from Art. II, Section 5 to Art. II, Section 1 without material change or comment.[13]

However, colorful records of frontier elections remain:

> "By custom, the ballot box was any sort of paltry cubical container found lying about the neighborhood. In San Francisco's first municipal election under American auspices, in 1846, they used an empty crate that had held flasks of lemon syrup. Down at the Pueblo de Nuestra Señora La Reina de Los Angeles, known to the Yankees as "Loss Anjeluss," it was a candle box perched on the window ledge of an adobe shack. And in Vallejo, up the bay from San Francisco, the election officers simply trotted out the same old cracker box, year

[13]Browne, *Debates in the Convention of California*, 75, 481 (1850); Willis and Stockton, *California Constitutional Convention of 1879*, 5, 394 (1880).

after year, until someone discovered that one of the judges was tucking supplementary ballots through a knothole in the back.

These vulnerable, virgin ballot boxes, crude as they were, attracted hordes of eager citizens, some of whom came to vote not once but several times. There was no register; the ballots were not numbered; and every man was encouraged to exercise his franchise, whether he was entitled to it or not. Even the crews of two French men-of-war voted in one San Francisco election."[14]

The passage of 120 years has brought remarkable changes in California election procedures. Haphazard and unsupervised Nineteenth Century frontier balloting has evolved into an orderly, regulated institution. Statutory reform, technological changes, and philosophical awareness of the electorate render individual voting fraud a relic of the past.

Contemporary studies of campaign and electoral practices in the United States are virtually devoid of any suggestion that individual vote-buying presently persists in any part of the country. The last reported case of vote-buying in California occurred in 1908.[15] The last such prosecution ever to be initiated in Los Angeles County occurred in 1926.[16] On the federal level, the total convictions for election law violations of all kinds between 1962 and 1970 made

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[14]Reinhardt, *Tapeworm Tickets and Shoulder Strikers*, 3 *American West*, 34, 37 (Western History Assoc. Quarterly) 1966.

[15]*Bush v. Head*, 154 C. 277 (1908).

[16]14 U.C.L.A. L. Rev. 699, 702 (1967).

up .000063 of all dispositions.[17] In the absence of definitive studies, commentators suggest that the practice of vote-buying is either extremely rare or extinct. (*Record*, Appendix to Points and Authorities filed with original Writ of Mandate.)

One commentator has concluded,

> "The characteristic complaint about popular elections until late in the nineteenth century was that they led to the sale of votes; that is to say, to individual transactions between poor men who had votes and rich men who wanted seats. Individual corruption of this kind is almost extinct in Western societies. This is due partly to the large size of modern electorates, partly to a tacit bargain between competing parties. Parties agree that on the whole the purchase of individual votes is expensive and embarrassing, and therefore discourage zealots anxious to compete in this sort of auction."[18]

California similarly exhibits a clean electoral pattern:

> "Honest elections are no longer the predominant problem, at least not in California. Channels for

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[17]Division of Procedural Studies and Statistics, Administrative Office of U.S. Courts. The statistics encompass generally all federal electoral violations (18 U.S.C. §§ 592-612), and do not indicate the presence or absence of prosecutions specifically for vote buying (18 U.S.C. § 597). Out of 299,559 total dispositions during the period, 42 dispositions and 19 convictions involved electoral offenses. These convictions may have included such esoteric crimes as keeping troops at the polls (§ 592), promising the use of influence by a candidate (§ 599), and soliciting political contributions from persons on relief (§ 604).

[18]Mackenzie, *Free Elections* 153 (1958). See also Rae, *The Political Consequences of Electoral Laws* 68 (1967) (voting corruption "is probably very rare in general elections".)

> contesting elections seem to be effective and the election officials have a healthy respect for public opinion with regard to the modern institutions of the secret ballot, permanent registration, and a non-partisan local precinct board, as testified to by the myriads of court decisions upholding procedures and the decreasing numbers of penalties meted out by the courts".[19]

Political reforms in the electoral process during the past century have been accompanied by significant changes in the mechanical voting process itself. The use of uniform paper ballots which eliminated the supplying of ballots directly from party headquarters with the attendant risk of being premarked, first occurred in California in 1872. (Pol. C. §§ 1187-88, now Elec. C. § 10000 *et seq.*)

This change cured some corruption but gave rise to the "Tasmanian Trick" whereby a voter exchanged his blank ballot with a ballot pre-marked by the party boss, which in turn was deposited in the ballot box. California's introduction of the Australian ballot in 1891 put an end to the practice by placing a numbered stub in the voting book which had to match the stub on the ballot handed to the election officer.[20]

Voting machines similarly advance the cause of ballot purity by making the "ballots" inaccessible to physical manipulation.[21] Over fifty percent of the

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[19]Jamison, *Local Election Administration in California*, Bureau of Governmental Research (1952) at 52.

[20]Reinhardt, *supra*, note 8 at 88.

[21]Buchanan and Bird, *Money as a Campaign Resource*, Tennessee Democratic Senatorial Primaries, 1948-1964, in Alexander,

1960 presidential vote, and sixty-five percent of the 1964 presidential vote, was cast on voting machines, demonstrating that "who votes is not so important as who counts."[22]

Today, the polling process is thoroughly regulated by the State and hemmed in by control mechanisms at every stage. For example, every precinct in the State encompasses approximately 200 voters polled (Elec. Code § 1561); in turn, each precinct is supervised by an independent board of three or more election officials (Elec. Code § 1604); each official must reside in or near the precinct which he supervises (Elec. Code § 1607). Such control maximizes the likelihood of personal knowledge of the voter by officials and eliminates the chances for even the slightest impropriety. Modern registration procedures, including check and double checks as to one's eligibility and identity, have also gone a long way towards eliminating the opportunity for election fraud.

Regulatory and mechanical changes in the electoral process have also been accompanied by philosophical maturation:

> "Party conflict since the 1930's has reflected social and economic appeals to a greater extent than in the preceding decades. Even though they do not yet approach the ideological fervor of European

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Studies in Money and Politics, Volume II (1970) 67, 68 and 88, note a decline in the "time honored practice of giving two dollars or a pint of whiskey to each citizen who manages to get to the polls .... Votes paid for simply were not delivered if the candidate was not acceptable, while the use of voting machines and improved election administration made delivery harder to insure." See also Banfield and Wilson, *City Politics* 99 (1963).

[22]Felknor, *Dirty Politics* 164-65 (1965).

campaigns, American politics has become more involved with issues and less with the issueless politics of patronage, favor, and preferment. Campaigning too, has shifted from the door-to-door canvass, local rallies, and controlled blocks of votes to the mass media and advertising agencies."[23]

The total number of electors, including women, minorities and eighteen year olds, has increased to such an extent that the chances of influencing an election result through vote buying and selling today is *de minimis*.

The demise of individual vote-bartering in California perhaps is illustrated best by a parallel change in the state's liquor laws. A century ago, candidates reportedly "would round up these prospective voters like so many cattle, confine them in corrals" and "keep them in a truly magnificent state of intoxication until the eventful morning . . ."[24] This threat of liquor-bought votes doubtlessly inspired the frontier era prohibition against the furnishing of alcoholic beverages during election hours. (Cal. Bus. & Prof. Code § 25630) The modern disappearance of the threat, however, led to the law's repeal in 1969. (Cal. Stats. 1969, c. 614, p. 1253 § 1) A newspaper account suggests the reason for the repeal with the observation that:

" 'Historically, it used to be that crooked politicians would get the prospective voters drunk

[23]Banfield, *Urban Government* 381 (1969).

[24]Newmark, *Sixty Years in Southern California*, 42 (3rd Ed. 1930).

> and influence their votes,' said [counsel] for the Department of Alcoholic Beverage Control. 'Changing methods of campaigning have made the ban obsolete' . . . 'It's probably less expensive to advertise your candidate in the mass media than buy everybody a drink,' he said."[25]

The conclusion is inescapable that voting fraud is simply no longer a realistic possibility. The disfranchisement of respondents and their class therefore rests upon an imagined rather than a real state interest. The California Supreme Court considered this historical analysis of California's election laws and practices and concluded:

> "In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transporting them to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squadron of computer technicians."
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> *Ramirez v. Brown, supra* at 214.

Respondents submit that the regulatory provisions now present in California's election laws are sufficient in themselves to warrant the conclusion of the California Supreme Court that total disfranchisement of ex-felons was not "necessary" within the meaning of *Dunn v. Blumstein, supra.* However, even further statutory safeguards exist.

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[25] *Los Angeles Times,* June 2, 1970.

2. Current California penal sanctions for election law violations adequately protect the electoral process.

As was determined by this Court in *Dunn*, the range of penal sanctions available to prevent election fraud can negate a state's claimed need for total disfranchisement. The California Court considered this argument and found that the State's development of penal sanctions was an adequate deterrent to election fraud and was an alternative to total disfranchisement of former felons:

> "The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, Ch. 38, pp. 110-111, §§ 98-105.) Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors. [Footnote omitted.] Among this plethora of offenses we take particular note, in the present connection, of the felony sanctions against fraudulent registrations (§ 220), buying and selling of votes (§§ 12000-12008) [Footnote omitted], intimidating voters by threat or bribery (§§ 29130-29135), voting twice, or fraudulently voting without being entitled to do so, or impersonating another voter (§§ 14403, 29430-29431), fraud or forgery in casting absentee ballots (§§ 14690-14692), tampering with voting machines (§ 15280), or ballot boxes (§§ 17090-17092), forging or altering election returns (§§ 29100-29103), and so interfering 'with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent

> the election or canvass from being fairly held and lawfully conducted.' (§ 17093). [Footnote omitted.]" *Ramirez v. Brown, supra,* at 215-16.

The California Court specifically found that the penal sanctions available to protect the elective process in California were, as this Court found in *Dunn,* "more than adequate to detect and deter whatever fraud may be feared. (405 U.S. at p. 353 . . . .)" cited at 9 Cal.3d at 216. Clearly, such a finding warrants the conclusion that the total disfranchisement of respondents is not the least burdensome method of preventing election fraud. That conclusion should be affirmed.

3. The theoretical possibility that a former felon may run for public office is not a compelling interest that warrants the complete disfranchisement of those persons convicted of infamous crimes.

Petitioners have attempted to justify the disfranchisement of those persons convicted of infamous crimes in California on the basis of California Government Code § 275. Petitioners' brief, p. 10.

California Government Code § 275 provides: "Unless otherwise specifically provided, every elector is eligible to the office for which he is an elector, and no person is eligible who is not such an elector." Thus, the argument advanced by petitioners is that if ex-felons become electors they will be eligible to run for office; that ex-felons should not run for office; and that therefore the appropriate remedy to prevent ex-felons from becoming candidates for office is to prevent them from becoming voters. The Section 275 argument was not made to the California Supreme

Court; it is obviously without merit. Even assuming there is a compelling and necessary state interest in prohibiting former felons from becoming candidates for public office, barring former felons from voting is hardly the appropriate way to achieve this end. Fully consistent with § 275, the California Legislature could simply enact a specific statute barring former felons from running for public office.[26]

4. Petitioners' contention that California's "pardon" procedures offer alternatives to respondents' suit to obtain unconstitutionally denied rights has no basis in law or fact.

Pardon (Cal. Penal Code §§ 4852.01-4852.21) is not a practical or effective device for obtaining the franchise. To become eligible for *consideration* by the Governor for a pardon, an ex-felon must (1) inform the chief of police or sheriff of the town or area in which he resides of his intention to apply for pardon, Cal. Penal Code § 4852.02(1); (2) furnish the chief of police or sheriff with his photograph, fingerprints, full information concerning his residence and occupation and "any other information concerning his conduct and manner of living which the peace officer may require" in his unlimited discretion, Cal. Penal Code § 4852.02(2); (3) "agree to submit to the super-

[26]Just as petitioner did not present any evidence to sustain her claim that former felon voting endangers the ballot box, she states in support of this point only that it would be "intolerable" (Brief, p. 10) to allow former felons to run for public office. A felony conviction is a matter of public record. The backgrounds of those who run for public office are particularly reviewed by opponents and made public for judgment by the voters. There is nothing to suggest that voters would be unable to weigh a felony conviction with the other qualifications and characteristics of future candidates for public office.

vision of the peace officer and conform to any reasonable requirements by the peace officer," Cal. Penal Code § 4852.02(3); (4) file a new notice with the appropriate peace officer if he changes his residence, together with a new set of fingerprints, photographs, information, etc., Cal. Penal Code § 4852.02(c); (5) wait for a period of time at least three years, 2 months up to a period of seven years, 2 months, during which time the applicant continues to submit to supervision and requirements of the peace officer, Cal. Penal Code § 4852.03; (6) file in the superior court an application for a court order of rehabilitation, serving a copy of the application on the peace officer and the district attorney of each county in which the applicant was convicted of a felony, Cal. Penal Code § 4852.06; and (7) secure from the court its recommendation of pardon and have it transmitted to the Governor, Cal. Penal Code §§ 4852.03 and 4852.16. Then, after the applicant has completed the three-to-seven years of this humiliating and degrading procedure, the Governor may, in his discretion, issue or refuse to issue a pardon (except that if the applicant was convicted of two felonies, the Governor cannot grant a pardon without the written recommendation of a majority of the Justices of the State Supreme Court), Cal. Penal Code § 4852.16. It is hardly surprising that during the four-year period from 1968 to 1971, only 282 pardons were granted (App., p. 21). During this same period, 34,262 men and women were released from state prisons (App., p. 21). This long, speculative and personally offensive "remedy" cannot constitute an excuse for denying the franchise to those who have

completed their court-imposed sentence of incarceration and parole.[27]

5. The restoration of the right to vote to former felons by other states indicates that California lacks a compelling interest in continuing its disfranchisement.

The absence of a compelling state interest in the exclusion of former felons from the franchise is perhaps most dramatically demonstrated by the practice of California's sister states. At present, twenty-five of the states either do not disfranchise persons convicted of a felony or infamous crime, or alternatively, provide an automatic restoration of civil rights, including the right to vote, upon completion of either sentence in prison, a parole, or a probationary period.[28]

The Uniform Act on Status of Convicted Persons (adopted today only by the State of New Hampshire) disfranchises a convicted felon only during the term

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[27]Petitioner also argues at pp. 21-24 of her brief that ex-felons may regain the franchise through "judicial" procedures (Elections Code § 350). Elections Code § 350 simply provides that one who is refused registration has a cause of action in the superior court to contest this refusal. Section 350 does not provide that former felons should be registered in such an action nor does it in any way contradict or modify the "infamous crime" prohibition in the California Constitution.

It is no remedy to tell respondents that, in the face of constitutional sections denying them the right to vote, they may go to superior court to "contest" their disfranchisement. Their only remedy, the one they employed, was to bring an action challenging the constitutional sections in question.

[28]Citations to and discussion of the pertinent state statutes are set forth in Appendix B hereto. It should be noted that at the time this action was originally filed in the California Supreme Court, 21 states automatically restored voting rights to former felons. Evidencing the modern trend in penal reform, four states have since enacted laws which restore civil rights to former felons.

of his actual imprisonment and not during any term of probation or parole; his right to vote is restored upon completion of his prison sentence no matter what the felony.[29]

Congress also has recognized the fundamental nature of the right to vote. In enacting legislation for the governing of the District of Columbia, Congress, in 1971, amended its previous disfranchising provisions to restore automatically the right to vote to former felons either upon completion of parole or a probation-type period of time. D.C.S.A. § 1-1102(7).

The trend which now finds a majority of jurisdictions automatically restoring the right to vote upon completion of parole is paralleled by present public attitudes favoring extending the franchise to persons who have paid their debt to society. The President's Commission on Law Enforcement and the Administration of Justice emphasized in its findings the necessity of "reintegrating offenders through active intervention on their behalf with community institutions" and warned against community restrictions which "lock out" the person who carries a criminal stigma. The Commission recommended the adoption of the Model Penal Code approach of automatic

[29]The Act provides in § 607-2:2(I) that: "a person sentenced for a felony, from the time of his sentence until his final discharge, may not: (a) vote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole . . ." § 607-a:5 provides for the restoration of the felon's right to vote or to hold future public office upon completion of service of his sentence or after service under probation or parole.

restoration of the right to vote upon completion of incarceration (App., p. 18).[30]

In the Spring of 1971, the Ford Foundation funded a study of registration and voting throughout the United States. A part of this study included a survey of attitudes toward voter eligibility. In the survey, conducted by the Education Fund of the League of Women Voters, the opinions were obtained from a representative sample of 16 categories of community organizations. Each was asked whether persons convicted of a felony and released from prison should be eligible to vote. The results were as follows:

National Association for the Advancement of Colored People	92% in favor
Labor Council Presidents	88% in favor
Youth Groups	97% in favor
Chamber of Commerce Presidents	81% in favor
American Legion Commanders	68% in favor
Non-Black Minority Groups	95% in favor
Democratic Party Chairmen	80% in favor
Republican Party Chairmen	65% in favor
Third Party Chairmen	66% in favor
County Board of Elections Chairmen	68% in favor
City Board of Elections Chairmen	83% in favor
Mayors	75% in favor
City Managers	76% in favor

[30]Similarly, the President's Commission on the Causes and Prevention of Violence concluded, after months of hearings and study of civil disorder, that denial of the right to vote tends to alienate people (particularly young people) and "to drive them into a search for an alternative, somewhat violent means to express their [feelings]." App., p. 18.

City Council President	79% in favor
Board of County Commissioners Chairmen	74% in favor
League of Women Voters	93% in favor

At least two-thirds of every group sampled felt that ex-felons should be entitled to vote (App., pp. 19-20).

Additionally, a survey recently conducted by the Secretary of State's office of all fifty-eight county clerks and registrars of voters in California indicates that the vast majority (90 percent) are satisfied with the decision of the California Supreme Court. Specifically, fifty-two of the fifty-eight county clerks and registrars of voters, representing counties which contain 97.39 percent of the registered voters of California, indicated such satisfaction.

The Secretary concluded:

> "Under the decision of the California Supreme Court, these administrative burdens are either eliminated or greatly simplified. The seriousness of the administrative burden which was imposed by the 'infamous crime' disqualification provision is confirmed by the aforementioned survey of county election officials which indicated widespread support for the decision of the California Supreme Court.
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> "In light of the administrative considerations stated above, the 'infamous crime' voting disqualification can only be justified, if at all, on grounds of general policy. It is doubtful, however, whether the state can demonstrate either a compelling or rational policy interest in denying

former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens." Memorandum Opposing Certiorari in *People of Calif. v. Ramirez,* U.S. Sup. Ct., No. 73-324.

6. The Individual Respondents.

The plight of the individual respondents herein was noted by the California Supreme Court in *Ramirez v. Brown* and demonstrates the difficulty of drawing inferences of unfitness from the mere fact of a felony conviction. 9 Cal.3d at 202.

Respondent Abran Ramirez was convicted of one felony, robbery by assault, in 1952, and was incarcerated for three months thereafter. This offense by its very nature need not be the act of a habitual criminal, but rather suggests the act of a moment's impulse. Moreover, the actual three month sentence on what appears to be a serious charge suggests the presence of mitigating factors. Now, more than twenty years later, Mr. Ramirez has moved to another state, become a family man, a farm laborer and a union member, desirous of exercising his full voice as a citizen. (App., p. 6).

Respondent Albert Sang Lee was convicted of possession of dangerous drugs in 1955; he served a

two-year prison term on this offense and upon his parole led an exemplary life for the ensuing 15 years. His offense involved no harm to other persons and no contempt for the electoral process. His parole successfully terminated 15 years ago. Even if the conviction were slightly probative of Mr. Lee's fitness to vote in 1955, it is certainly of no probative value in 1973. (App., p. 7).

Respondent Larry Gill was convicted of forgery in 1957 and burglary in 1952 and 1967; all offenses admittedly were committed in an effort to support a narcotics habit. Mr. Gill has successfully ended his addiction and is now employed full time. (App., p. 7). In his declaration (*Record,* Exhibit C to Petition for Writ of Mandate) Mr. Gill stated: "Now that I'm not against society, not preying on society, and I'm standing on my own two feet, voting is a right I should have. If I can vote, my past won't be my present. My present should be my present. The state won't let it rest, you pay forever. We should be entitled to this reward; an ex-felon has to work harder to earn it than anyone else."

The question today is whether any inference of unfitness can be drawn from simple status to show that ex-felons as a class are more likely than not to constitute a threat to the integrity of the electoral process. Clearly, neither respondents as individuals nor former felons as a class have been shown by the state to share visible traits of unfitness for electoral participation.

Indeed, if it can be demonstrated that former felons share any trait as a class it is not their susceptibility to voting fraud but their disproportionate derivation from the ranks of racial minorities and the poor. Nearly half the former felon population in California is non-white,[31] a figure twice their ratio in the general population.[32] This two-to-one disparity matches the statistic that minority group defendants in a Los Angeles study were twice as likely to receive sentences of 12 months or more than were white defendants.[33] An ex-felon is very apt to be poor. Practically all ex-felons, by definition, are indigent at the time of their release from prison. More than 75% of all former felons are indigent.[34] In eliminating former

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[31] *Characteristics of Male Felon Population in California State Prisons*, December 1971 (Research Division, State Department of Corrections). 51.1 percent of the population is White, 30.8 percent Black, 16.5 percent of Mexican descent, and 1.6 other non-White.

[32] *General Population Characteristics, California*, Bureau of the Census Reports, 1971, Table 18 and App. A, shows California's ethnic composition as 73 percent White, 7 percent Black, 16 percent of Mexican descent, and 4 percent other non-White.

[33] Lemmert and Rosberg, *The Administration of Justice to Minority Groups in Los Angeles County* (Univ. of Calif. Press, 1948). The study indicates that 11.5% of Black defendants, 17.6% of Mexican-American defendants, but 43.2% of White defendants, received sentences of less than 9 months; 65.3% of Black defendants, 35.3% of Mexican-American defendants, but only 29.7% of White defendants received sentences of more than 12 months.

[34] Of all former felons in Washington, D.C., in 1965, 90% had income below $5,000 annually, Wallsch, *A Description of Active Juvenile Offenders and Convicted Adult Felons in the District of Columbia, Vol. II*, Stanford Research Institute (1966) at pp. 9, 15, 48, 52, 53. A study of those ex-felons having full employment in Boston, Mass., showed 78% having income below $5,200 annually, Bing and Rosenfeld, *The Quality of Justice in the Lower Criminal Courts in Metropolitan Boston: Report to the Governor* (1970) at 125.

felons, the current voter registration practice clearly disproportionately affects racial minorities and the poor.

Thus the record reveals no compelling state interest for the exclusion of former felons from voting. The plethora of criminal sanctions for voter fraud and the present operation of the California voting process protects against any danger of fraud. If there is any state interest involved, it is the interest of restoring human beings who have paid their debt to society to the personal dignity and position in a democratic society which necessarily includes the right to vote.

II

THE PENALTY PROVISIONS OF SECTION 2 OF THE FOURTEENTH AMENDMENT DO NOT EMPOWER THE STATES TO ABRIDGE THE RIGHT TO VOTE IN A MANNER WHICH VIOLATES THE EQUAL PROTECTION CLAUSE OF SECTION 1

A. This Court Has Declined to Give Weight To The Contention That Section 2 of the Fourteenth Amendment Somehow Affects or Controls The Ambit of the Equal Protection Clause As it is Applied to The Right to Vote.

The Constitutional standards of *Dunn* and its forerunners have not been directly disputed by petitioner in this Court or before the California Supreme Court. Rather, petitioner argues that, even if it be conceded that there is no compelling interest in California for disfranchising former felons, California may nevertheless deny the right to vote to ex-felons because of the language of Section 2 of the Fourteenth Amend-

ment to the United States Constitution. Section 2 of that Amendment provides for reduction of representation in the Congress when a state denies the franchise to 21-year-old male inhabitants of the state, "except for participation in rebellion or other crime." In support of her Section 2 contention, the Mendocino County Registrar states at page 15 of her Brief, "It has been consistently acknowledged by the U.S. Supreme Court that the states may disenfranchise for crime," citing *Davis v. Beason,* 133 U.S. 333 (1890); *Trop v. Dulles,* 356 U.S. 86 (1958); and *Lassiter v. Northhampton County Board of Elections,* 365 U.S. 45 (1959).

Reliance upon these three cases is misleading. Nowhere in the text of the decision in *Davis v. Beason, supra,* is Section 2 of the Fourteenth Amendment even mentioned. Nor did the case deal with ex-felon voting. Mr. Justice Field begins the opinion of the Court with the following statement:

> "On this appeal our only inquiry is whether the district court of the territory had jurisdiction of the offense charged in the indictment, of which the defendant was found guilty [Registering to vote although a Mormon]. If it had jurisdiction we can go no further. We cannot look into any alleged errors in its rulings, on the trial of the defendant. The writ of habeas corpus cannot be turned into a writ of error to review the action of that court." 133 U.S. at 341.

In fact, *Davis, supra,* dealt with an Idaho territorial statute denying the right to vote to bigamists or polygamists who taught or counselled others to become

bigamists or polygamists. The Court considered whether an act of Congress also dealing with polygamists voting conflicted with the territorial statute, and held that it did not. Petitioner has misconstrued the case with the aid of four ellipses eliminating all reference to polygamy and bigamy, while leaving in statutory sections not in fact under consideration by the Court.

Trop v. Dulles, 356 U.S. 86 (1958), the second case relied upon by petitioner for the proposition that this Court has "consistently acknowledged that states disenfranchise for crime," also makes absolutely no reference to Section 2 of the Fourteenth Amendment. *Trop, supra,* involved a statute that prescribed loss of citizenship as punishment for conviction by court-martial of wartime desertion. This Court held that the statute violated the Eighth Amendment to the United States Constitution.

In the third case, *Lassiter v. Northampton County Board of Elections,* 365 U.S. 45 (1959) this Court upheld a North Carolina statute and constitutional provision that made literacy a voter registration prerequisite. Section 2 of the Fourteenth Amendment is mentioned in the opinion but was cited only for the proposition that the "right to vote" is not absolute and may be, within reason, regulated by the states.[35]

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[35]The Court mentioned "previous criminal record" along with "age" and "residence requirement" as examples of matters which in 1959 were typical state limitations on the right to vote. It should be noted that *Davis, Trop,* and *Lassiter* were all decided prior to the enunciation by this Court of the fundamental nature of the right to vote and the compelling interest test. Subsequent decisions

365 U.S. at 51. This Court made no holding or comment whatever concerning the impact of Section 2 on persons disfranchised for criminal convictions.

In *Oregon v. Mitchell,* 400 U.S. 112, 152 (1970); *Carrington v. Rash,* 380 U.S. 89, 97 (1965); and *Reynolds v. Sims,* 377 U.S. 533, 589 (1964) Mr. Justice Harlan, dissenting, urged that this Court give Section 2 the almost identical construction now urged by petitioner.

In each case this Court did not do so. In fact, the Court in *Oregon* upheld a federal law passed pursuant to the equal protection clause of the Fourteenth Amendment preventing the states from denying the franchise in federal elections to those persons eighteen years of age despite the specific language of Section 2 stating that no penalty shall be suffered by the states for denial of suffrage to persons under twenty-one years of age.

Mr. Justice Brennan, concurring in part and dissenting in part in *Oregon v. Mitchell, supra,* explicitly rejected the Section 2 argument holding that Section 2 was intended as no more

> "than a remedy supplementary, and in some conceivable circumstances indispensible to other congressional and judicial remedies available under Sections 1 and 5,"

and that to hold otherwise

> "would appear to allow a state to exclude any unpopular group from the political process solely

in *Oregon v. Mitchell, supra,* and *Dunn v. Blumstein, supra,* have altered the permissibility of various age and residence requirements.

upon the basis of its political opinions." 400 U.S. at 252, N. 34.[36]

[36]Petitioner states at the outset of her argument that "disfranchisement of ex-felons has been *universally* approved in the federal courts". Brief at p. 6 (Emphasis Added). Her argument then goes on to cite the case of *Stephens v. Yeomans*, 327 F. Supp. 1182 (D.N.J. 1970), which held directly contra. In *Stephens*, a three-judge federal court struck down New Jersey's disfranchising provisions.

Petitioner further argues that the four federal courts in *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), Aff'd *per curiam* 411 U.S. 961 (1973); *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971); *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), Aff'd *per curiam* 396 U.S. 12 (1969); and *Green v. Board of Elections of the City of New York*, 380 F. 2d 445 (2d Cir. 1967), correctly upheld state disfranchising laws under § 2 of the 14th Amendment to the U.S. Constitution.

Petitioner has stated at page 12 of her brief that *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972) "appears to be on all fours with the position of Petitioner Richardson and virtually in direct conflict with the decision of the California Supreme Court below." In fact, this contention is incorrect. This Court in *Fincher v. Scott*, ... U.S. ....., 93 S.Ct. 2151 (1973) rejected a challenge to state disfranchisement of presently incarcerated, convicted felons, Jurisdictional Statement, O.T. 1972 No. 72-1334 at 6, 7, 18, 20. The decision by the California Supreme Court was specifically limited to those former felons whose terms of incarceration and parole had already expired. *Ramirez v. Brown*, 9 Cal. 3d at 217, N. 18 (1973).

In *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971), a Federal District Court upheld Georgia's disfranchising laws. The Court, however, did not discuss the constitutional standard to be used when testing voting restrictions but merely jumped from an initial observation that "a state has an interest in preserving the integrity of her electoral process" to the conclusion that "[T]herefore, Georgia has a compelling state interest sufficient to justify the voting restrictions . . . of the Georgia Constitution." 327 F. Supp. at 73.

The Court in *Kronlund* attempted to distinguish *Stephens v. Yeomans, supra*, by citing the New Jersey Court's finding that the development of New Jersey's disfranchising laws had produced "remarkable contrasts in treatment of ex-felons that did not exist in Georgia." 327 F. Supp. at 74. Respondents submit that *Stephens* is directly applicable to the facts at hand. A "haphazard scheme" of disfranchisement did exist in California prior to the decision below. *Kronlund* is therefore inapplicable under its own reasoning. 327 F. Supp. at 74.

In *Green v. Board of Elections of the City of New York*, 380 F. 2d 445 (2d Cir. 1967) the Court applied the "rational basis" test in holding constitutional the disfranchisement of "a convicted

B. The Legislative History to Section 2 Fails to Support Petitioner's Suggested Interpretation.

When the 39th Congress debated the Fourteenth Amendment at the conclusion of the Civil War, the Republican party was dominant in both Houses. Foremost among Republican objectives was assuring that the new representational power resulting from the abolition of slavery did not increase the Congressional representation of Southern Representatives loyal to the Confederacy.[37] Republican leaders believed they could accomplish this objective either by reducing Southern representation in Congress to off-set the projected increase in the South, or by enfranchising the emancipated Negro voters who were deemed likely to vote the Republican ticket.[38]

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mafiosi." 380 F. 2d at 448. *Green* was decided prior to this Court's decisions in *Kramer, Cipriano, Evans, Kolodziejski, Bullock* and *Dunn*. Moreover, in *Beachum v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969) the District Court, in a two page opinion, did not consider the equal protection argument set forth by the California Supreme Court in *Ramirez v. Brown*. Instead, it based its conclusions on an unanalyzed quotation from *Green* and considered the case to be a challenge to the discretionary exercise of the Governor's pardon power. *Beachum* at 183-184. It is thus not dispositive of the issues herein.

[37]The Report of the Joint Committee on Reconstruction repeats concerns "whether conquered rebels may change their theater of operation from the battle-field, where they were defeated and overthrown, to the halls of Congress, and, through their representatives seize upon the government which they fought to destroy." "Report of the Joint Committee on Reconstruction," *H. R. Rep.* No. 30, 29th Cong., 1st Sess. (1866), at xx; Bonfield, "The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment," 46 *Corn. L.Q.* 108, 109 (1960); Flack, *The Adoption of the Fourteenth Amendment* 98, 126 (1908); Van Alstyne, "The Fourteenth Amendment, The 'Right' to Vote and the Understanding of the 39th Congress", 1965 *Sup. Ct. Rev.* 33, 44.

[38]Bonfield, *supra*, at 109; Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* at 290, 291; James, *The Framing of the Fourteenth Amendment* (1956); Remarks of Rep. Stevens, *Cong. GLOBE* 39th Cong., 1st Sess. 2466 (1866) (hereafter *GLOBE*).

Republican objectives met two impediments. First, universal Negro suffrage, which could not be assured without its incorporation into the Fourteenth Amendment, was unacceptable in many parts of the North and if adopted might create a Northern reaction against Republicans.[39] Second, disfranchisement of ex-Confederates generally was not conceived as permanent, but rather to last only so long as necessary for each ex-Confederate voter to return his allegiance back to the Union.[40] Thus, the penalty provisions of Section 2 emerged to satisfy the Northern Republicans' diverse objectives.[41]

Sections 1 and 2 of the Amendment were not introduced and discussed in the Reconstruction Committee as a single text. Rather, § 2 was originally approved by the Joint Committee and reported to the House on January 22, 1866, as H.R. No. 51, a wholly separate constitutional amendment. It was debated at length and approved by the House in its original form before the proposal that ultimately became § 1 was even reported to the House, on February 13. It was debated at equal length in the Senate in February and March of 1866, nearly two full months before it reappeared

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[39]Kendrick, *supra*, at 291; Flack, *supra*, at 111, 118; Zuckerman, *supra*, at 93, 94 (1961).

[40]James, *The Framing of the Fourteenth Amendment*, 138, 139 (1956), *GLOBE*, at 2537, 2540, 2543, 2770.

[41]"Report of the Joint Committee on Reconstruction," *supra*, xiii; Van Alstyne, *supra*, at 58, 65; James, *supra*, at 185; Bonfield, *supra*, at 111. The "rebellion or other crime" language did not appear in early drafts of Section 2; it was apparently added to Section 2 so that border states which had disfranchised large numbers of rebels would not suffer loss of Congressional representation as a result. Kendrick, *supra*, at 223; Zuckerman, *supra*, at 101.

in the Joint Committee's Report of April 30 as part of the packaged Fourteenth Amendment. In the course of its consideration, the issue of "preemption by implication" was fully discussed. While the possibility of such an implication disturbed and alienated a number of Radicals otherwise sympathetic to the limited objective of the proposal, the existence of any such implication was emphatically denied by both the House and Senate chairmen of the Joint Committee that reported the bill. Far from being a single text the several parts of which were carefully and deliberately integrated by men of a common mind and a mutual understanding of the implications and interrelationships of the several sections, the Fourteenth Amendment was a package of proposals, the more significant of which were pieced together from independent bills offered by different men at different times and originally debated in Congress as wholly separate amendments. Indeed, the brevity of the three-day House debate on H.R. No. 127, the packaged Fourteenth Amendment bill, is probably attributable to the fact that its most significant components had previously been considered at length. A more accurate description of the placement of § 2 in the Fourteenth Amendment is that "[i]t became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment."[42]

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[42]Van Alstyne, "The Fourteenth Amendment, The 'Right' to Vote and the Understanding of the 39th Congress," 1965 Sup.Ct. Rev. 33, 43-44.

Mr. Justice Brennan, in *Oregon v. Mitchell, supra,* (dissenting in part and concurring in part), noted how the historical environment to the adoption of the Fourteenth Amendment was characterized by "a noticeable lack of precision" and a "tendency toward irregularity . . . in legislation, and in legal interpretation and that the framers of widely divergent views papered over their differences with a broad, elastic language of Section 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved." 400 U.S. at 252, 274-75.

III

THE ARBITRARY AND DISCRIMINATORY APPLICATION OF CALIFORNIA'S VOTING LAWS PRIOR TO THE DECISION BELOW WAS IN ITSELF VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has consistently recognized that discrimination in voting resulting from geographic inequities is subject to challenge under the equal protection clause of the Fourteenth Amendment. *Gordon v. Lance,* 403 U.S. 1, 4 (1971); *Reynolds v. Sims,* 377 U.S. 533, 565-66 (1964); *Gray v. Sanders,* 372 U.S. 368, 379 (1963).

Prior to the decision in *Ramirez v. Brown,* California's 58 County Clerks and Registrars of Voters decided which crimes were "infamous" under the California Constitution as interpreted in *Otsuka v.*

Hite, 64 Cal.2d 596 (1966). Thus county-to-county variances arose in the disfranchisement of ex-felons.[43]

A chart setting forth the results of a survey taken by California's Secretary of State in 1972 (App., pp. 33-40) indicates the following clear examples of the geographical disparity in the application of California's election laws that existed at the time respondents petitioned the California Supreme Court for relief: Five counties register a person convicted of murder but six do not; eight counties register in spite of a robbery conviction and seven do not; four register for grand theft and five do not; ten register for burglary but three do not; four register for obtaining by false pretenses and two do not; six register for bad checks but four do not; four register for mail fraud and three do not; four register for absconding with public funds but two do not; four register for desertion and three do not; nine register for selling narcotics and five do not.

Thus, the total lack of uniformity in the application of California's election laws had resulted in the choice of a county of residence being the deciding factor in the success of respondent's efforts to register to vote.[44]

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[43]At the time of the Secretary of State's survey, petitioner Viola Richardson, Mendocino County's Registrar, had no written guidelines for determination of which former felons were eligible to register. An ex-felon who attempted to register was told to make an appointment to discuss his case with the local district attorney. (*Record,* Exhibit "D" to Petition for Writ of Mandate.)

[44]Similarly, intra-county classifications defy rational analysis. Santa Barbara County, for example, registers for auto theft but not for arson; San Joaquin for burglaries but not for grand theft; San Diego for smuggling but not for mail fraud; Sacramento for embezzlement but not forgery; San Bernardino for child molesting

In oral argument before the California Supreme Court the California Attorney General candidly admitted that this lack of uniformity violates the Constitution:

> "I think there's no question that you have the geographic denial of equal protection on that ground. I think we have to admit that. Just based on what the factual situation is at the moment, and it's an unfortunate situation when you get a county, Los Angeles, for example, I believe it is, says that somebody who commits statutory rape, they can't vote and somebody commits rape they can . . . And they [Los Angeles] said, we feel that somebody is charged with possession of marijuana, under the State law, that's an infamous crime, but if it's under the Federal law it's a tax case and it's really not an infamous crime. . . . I said, 'Well, what do you mean?' And the attorney said to me, well, he said—I said don't you realize as a practical matter when somebody gets sent to the Federal Penitentiary on a marijuana deal it's a big deal, it's not a little deal? And he said, I know, but we have to have some distinction, and I think the distinction they make was just—to me it was too legalistic (Appendix A, pp. 4-5)."

Furthermore, the Secretary of State has articulated to this Court the administrative inequities that existed in California:

> "Prior to the *Ramirez v. Brown* decision, each county had to determine for itself which convic-

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but not prostitution; Riverside for forgery but not for public embezzlement; Orange for rape but not robbery; and Los Angeles for forcible but not statutory rape.

tions would be grounds for disenfranchisement from voting. Once such a determination was made, it had to be implemented by the county clerk's office and by thousands of deputy registrars of voters, who usually are private citizens who register voters on a part-time basis. Since deputy registrars were frequently unable to decide individual cases, questionable voters were generally referred to the county clerk's office. The 'infamous crime' voting disability thus made the process of registering voters more complicated and undoubtedly discouraged some qualified electors from registering to vote." Memorandum Opposing Certiorari in *People of Calif. v. Ramirez,* U.S. Supreme Ct. No. 73-324.

The California Constitutional and statutory provisions by their terms deny the right to vote only to those felons who have been convicted of "infamous crimes." However, since the language of this disqualification is clearly not susceptible to uniform application throughout the State and instead results in irreconcilable differences amongst counties, the disfranchising provisions may be stricken down on that ground alone.

This unbridled discretion vested in county registrars is of the sort that has long been prohibited by this Court. In *Louisiana v. United States,* 380 U.S. 145, 150 (1965) this Court affirmed a lower court holding that a Louisiana voting test was unconstitutional when it "vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not." 380 U.S. at 150. Justice Black's language in that opinion is appropriate here:

"The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." 380 U.S. at 153.

CONCLUSION

For the foregoing reasons respondents submit that the judgment of the California Supreme Court below should be affirmed.

Dated, December 20, 1973.

Respectfully submitted,

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(Appendices A and B Follow)

Appendix A

In the Supreme Court
of the State of California

Abran Ramirez, etc.
Petitioners,
vs
Edmund G. Brown, Jr., Secretary of State of the State of California, et al.,
Respondents.

HEARING ON PETITION FOR WRIT OF MANDATE

Monday, February 5, 1973

For Petitioners:
Burton D. Fretz, Esq., et al.

For Respondents:
George J. Roth, Esq.,
Deputy Attorney General

Mr. Roth: May it please the Court I represent the Secretary of State in this matter and it's an unusual case because of the nature of the case the Attorney General has an interest in it. However, as indicated by our pleadings our interests are very close together. The Attorney General is particularly careful and wants to point out to the Court the difference in the

pleadings and the Secretary of State has responded in that matter to exclude prisoners from this State who are serving terms or who are on parole. The petitioners have excluded those people from their pleadings and it may be that that is the subject of another lawsuit. We feel very strongly that based on the pleadings in this case at this time there's nothing before the Court relating to prisoners in prison or on parole.

The Court: Mr. Roth that would mean that you would say that the first alternative offered by the Petitioner was one we shouldn't consider then.

Mr. Roth: Well——

The Court: Which he included in his class——

Mr. Roth: Yes. By his pleadings I don't see he can get to that alternative.

The Court: However that wouldn't affect his second alternative as I understand it, which would be those that were under conviction, incarcerated or on parole would be——

Mr. Roth: Well, I believe he excludes those. And basically we start with the idea that prisoners in prison and on parole are put there for punishment purposes, but they may be for rehabilitation or punishment, but we start with the idea that somebody is sent to prison as punishment for a crime, hopefully they'll be rehabilitated and during this period one of the punishments is the deprivation of civil rights. We feel very strongly that the State has a compelling interest and also a reasonable relationship to the end to be achieved. We think we meet all the tests insofar as people in prison or on parole are concerned.

Mr. Roth: We're not talking about people in county jails waiting to be sentenced or serving misdemeanor sentences. Those people can vote. They vote right now, as far as we know. It it's called to our attention, we advise people that prisoners in county jails have a right to vote.

The Court: Mr. Roth, what about the person who is convicted in the trial court and has the matter on appeal? Would he be excluded or not?

Mr. Roth: It's a question of where do you have a judgment? If he's in prison I believe that you have to exclude him, Your Honor, as far as the punishment. He's still serving sentence—it's part of his sentence.

The Court: I'm talking about the man who hasn't gone there.

Mr. Roth: Well, still until he goes to prison I think you have a different problem. Uh——

The Court: It's hard to define, Counsel.

Mr. Roth: Very hard, Your Honor.

The Court: Because frequently, as you well know, the county jails are filled with individuals who have been convicted of felonies and who as a condition of probation may be serving time on the county level.

Mr. Roth: That's true. If it's probation we're talking about, then we feel that that person can vote.

The Court: Now, even though he has been convicted of what at one time might have been thought to be an infamous crime——

Mr. Roth: Well——

The Court: ——a felony, of a certain type.

Mr. Roth: Let me put it this way, Your Honor. That if—the Attorney General, and that means Secretary of State agree in this principle; They agree with the petitioners to this extent. That if the person has been in prison, has served his term in prison and has completed his parole, that possibly except for election code felonies, and really they're de minimus as I understand it—there hasn't been one in many, many years that we know of—but at any rate, that the people who are finished with the particular sentence altogether, that if they should vote is a matter for the Legislature to decide. That's our position. That's the Secretary of State's position. The big problem we see here was to try and define in the case the justiciable issue before this Court when we framed our pleadings, because we, I guess, came up with almost an amicus brief that's really asking the Court for declaratory relief, to tell us and to tell everybody in the State what infamous crime means.

The Court: I assume that's because each county has interpreted it differently.

Mr. Roth: I think there's no question that you have the geographical denial of equal protection on that ground. I think we have to admit that. Just based on what the factual situation is at the moment, and it's an unfortunate situation when you get a county, Los Angeles for example, I believe it is, says that somebody who commits statutory rape, they can't vote and somebody commits rape they can, and I suppose the theory is that statutory rape there's some chicanery or deceit connected with it with a young

girl and I talked to the County Counsel's office and I had to write an opinion, the Court's probably familiar with it, it's in 53 Cal. App., it's on the Otsuka case, and frankly I read Otsuka I guess 27 times and I rewrote the opinion 13 times to try and figure out what to say. But, I talked to the County Counsel's office at Los Angeles who has done more research on it than anybody, and I said "How do you come to this conclusion, what is meant by an infamous crime? And they said, well, we feel somebody is charged with possession of marijuana, under the State law, that that's an infamous crime, but if it's under the Federal law it's a tax case and it's really not an infamous crime it's—— (Laughter)

I said, "Well, what do you mean?" And the attorney said to me, well, he said—I said don't you realize as a practical matter when somebody gets sent to Federal Penitentiary on a marijuana deal it a big deal it's not a little deal? And he said, I know, but we have to have some distinction, and I think the distinction they make was just—to me it was too legalistic.

The Court: In view of the State's inability to define an infamous crime, how can it show a compelling interest that those persons allegedly convicted of it should be kept from voting?

Mr. Roth: I——

The Court: In other words, the burden lies with the State, doesn't it?

Mr. Roth: Your Honor, I think the problem is this: That you said in view of the State's inability to define the crime, and I think the problem is that

the crime has not yet been defined. There is inability to define it and whether this Court does it or the Legislature does it, somebody should do it, and I think it can be done and possibly, and I say this with reservations because I'm not sure—I've read the Federal Cases and I've read many of the State cases—and I suppose in certain instances the State may be able to show a compelling State interest in a rational means for the end, if it's defined.

The Court: Of course the Legislature has now had seven years in which to do it.

Mr. Roth: Well——

The Court: Since Otsuka——

Mr. Roth: Well, now—that's true, Your Honor, however they now have the Constitutional mandate to do it, because they didn't have that before. All they had was this Court's suggestions——

The Court: Do you find justice, do you find some significance in the Constitutional change?

Mr. Roth: I think so, Your Honor, very much.

The Court: What significance?

Mr. Roth: Number one, the constitutional change took the word "ever" out which under the old constitution meant, as I read it, that once somebody was convicted of an infamous crime, for ever after they would be disenfranchised unless they in effect has a pardon from the Governor. You pointed out in Otsuka that if they went through a 350 Election Code, 350 rehabilitation proceeding to prove their rehabilitation they could vote. That modified the law somewhat. But it still said forever. That was taken out

of the constitution and the constitution now specifically says the Legislature shall enact laws to or in effect enabling legislating to carry out this policy and I think that the Legislature has this mandate. The Court may not want to wait for the Legislature to do it.

The Court: Well, are you suggesting then that any statutes on the books prior to the constitutional amendment are invalid because not re-enacted?

Mr. Roth: No, no. I believe that what's on the books is enabling legislation. But when you look at the statutes that talk about striking votes for infamous crimes, it's a problem. It's still there, we still have the problem.

The Court: I find it difficult to find any significance in the omission of the word "ever."

Mr. Roth: Well to me that's the most important part of the change, Your Honor.

The Court: It seems to be a matter of semantics. The original constitution provision didn't have the word in and it was subsequently added, and now it's omitted. It looks to me like it's just a semantical——

Mr. Roth: Well, it's hard to tell and it's really to impute the knowledge of what the change meant to the voters because it was done in the Legislature and really this is not legislation but the people voting, it's different and so whether or not we can impute the change to the desire of the people to make the change is questionable, I agree. But you have problems—all we're asking is help from the Court so the people know what infamous crime is.

I'd like to get back again, if I may, to the question of the prisoners in prison or on parole. Because really that is what interests us, it interests the Secretary of State, it interests the Attorney General more. Now I have a client and I'm his lawyer, and I guess there's a fine line in the lawyer-client relationship that I hopefully trying very delicately but honestly, and within the framework of the Code of Ethics. And the Attorney General is very much interested in being certain that the prisoners in prison and on parole do not vote. There's a tremendous amount of problems. What I'm alluding to, the City of Folsom in order, in the newspapers, get a tax advantage of some time as I understand it, annexed Folsom Prison and it may backfire on them if the prisoners are allowed to vote. But here's what happened—(Laughter)

If the prisoners in Folsom Prison are permitted to vote, then they vote for the City Council of the City of Folsom they will in effect control who the police chief is and under our system of administration of justice in California, the local agencies are the ones who investigate the crimes in the prisons. When a crime occurs in San Quentin the District Attorney's office over in Santa Rosa I guess it is goes in and investigates it. The Sheriff investigates it. And if you had prisoners in San Quentin Prison voting and saying that they're residents of that County they could elect their own sheriff and their own District Attorney, it would be a great thing. You have administrative problems.

The Court: Are they counted in the population in the census polls?

Mr. Roth: I don't think San Quentin is at the moment, but you never know when somebody is going to annex them, Your Honor. They did it in Folsom——

The Court: Well, if they get the benefits why shouldn't they have the detriments?

(Laughter)

Mr. Roth: But the—there's other problems. There's many administrative problems that I can see. For example supposing that this Court was to say that prisoners in prison could exercise their franchise in any election in this State and somebody said—they might say, well they wouldn't have to set up polling booths, they could vote by absentee ballot. Well, I could forsee immediately that question of denial of equal protection, because they would say well the League of Women Voters has no right to come in and present their candidates night in our prison and the candidates can't come through and shake hands with—we don't get to meet the candidates, we don't have the same knowledge that the rest of the voting population has.

The Court: Mr. Roth, isn't this really a straw man that you're building up here? The members—the Petitioners here are not prisoners and the class of which they are members do not include prisoners or parolees, they're all out, they served their time, one of them 18 years ago——

Mr. Roth: Your Honor, that's the greatest thing I've heard today. Because as long as the Court feels that way, I'll stop.

The Court: Well, I'm not thinking for any of my colleagues——

Mr. Roth: If the Court has any further questions.

The Court: I think not. Thank you.

Mr. Roth: Thank you, Your Honor.

Appendix B

The following states provide for either no disfranchisement of ex-felons or automatically reinstate those persons whose terms of incarceration, parole or probationary periods have ended.

1. *Arkansas,* seemingly, has repealed its disfranchising provision. The Arkansas Constitution delegated to the Legislature the power to deprive convicted felons of the right to vote. Ark. Const. Art. 3, § 1. But in 1969, the entire Arkansas Election Code, containing a disfranchising provision, was repealed. Ark. Stat. Ann. § 3-101 (1956). The law replacing it no longer excludes ex-felons. Ark. Stat. Ann. § 3-707 (Supp. 1971).
2. *Colorado* excludes those persons serving on sentence but automatically restores "all rights of citizenship" upon release. Colo. Const. Art. VII, § 10, C.R.S. 49-3-2(1).
3. *Delaware* disfranchises those persons who are convicted of a felony. Delaware Constitution Art. V, § 2. However, 15 Del. C. § 1701 automatically restores the right to vote to all former felons, even those convicted of an election code felony, 10 years after conviction and sentence.
4. *Hawaii* previously had a "felony" prohibition, Hawaii Const. Art. II, § 2, but in 1968 amended its constitution to restore the right "upon his final discharge." Hawaii Const. Art. II, § 2. H.R.S. § 716-2.
5. *Illinois* also prohibits those "under sentence" but restores an ex-felon's right to vote "not later than upon completion of his sentence." Ill. Const. Art.

3, § 2. Ill. Ann. Ch. 46, § 3-5 requires the Illinois Department of Corrections to supply to a released person a certificate that is to be presented upon registering to vote.

6. *Indiana* grants its Legislature the power to "render ineligible any person convicted of an infamous crime." Indiana Const. Art. 2, § 8. But the Legislature has seemingly limited this disfranchisement to "the period of such imprisonment." Burns Indiana Stat. Code Edition 3-1-21-4, § 29-4804.

7. *Kansas* has retained its constitutional prohibition upon a "felony" conviction, Kansas Const. Art. 5, § 2, but restores "all civil rights" when a prisoner is discharged from prison upon serving his term or when the parole board releases him from parole and grants him a certificate of discharge. Kansas Stats. Ann. 22-3722.

8. *Maine's* Constitution at Article II, § 1, disfranchises only those "under guardianship for reasons of mental illness." Seemingly, no disfranchisement exists for convictions of crime.

9. *Massachusetts'* Constitution, Part I, Article IX, gives the Legislature the power to set qualifications. The Legislature has done so and prescribes only one pertinent disability—"being temporarily or permanently disqualified by law because of corrupt practices in respect to elections." Mass. Stats. Ann., Chapter 51, § 1, 1A.

10. In *Michigan*, the Legislature also is given the power to exclude persons who have been committed to a penal institution. Mich. Const. Art. 2, § 2. But the Legislature seems not to have so chosen because the pertinent statute, Mich. Laws

Ann. § 168.10, defines a "qualified elector" as any person who possesses the qualifications prescribed in Article 2, § 1 of the Constitution, wherein there are no relevant disqualifications.

11. *Minnesota* excludes those convicted of "bribery, perjury, or any other infamous crime," Minn. Const. Art. 4, § 15, but restores the right to vote, at the latest, "upon expiration of sentence." Minn. Stats. § 609.165 (1).

12. While *Missouri* disfranchises persons convicted of a felony or an election crime, Missouri Const. Art. 8, § 2, its statutes provide mandatory restoration of civil rights upon release from parole in all cases of first conviction of a felony. Mo. Stats. § 216.355(3).

13. *Montana,* in 1972, held a constitutional convention which adopted new Article IV, § 2 (ratified June 6, 1972). That Article provides that "any citizen . . . is a qualified elector unless he is serving a sentence for a felony." No other disfranchisement for crime appears. See also Mont. Stat. § 23-2701(2).

14. *Nebraska*—While Article VI, § 2 of Nebraska's Constitution disqualifies those persons convicted of treason or felony, a Nebraska statute requires the Board of Parole to issue a certificate of discharge upon completion of sentence or parole; which certificate "shall restore civil rights." Nebraska Stats. § 83-1, 118(4).

15. *New Hampshire* limits its exclusion to persons convicted of "treason, bribery, or any willful violation of the election laws of this state." New Hamp. Const., Part I, Art. 11, but allows restoration upon completion of sentence while on parole

or probation for any felony." N.H. Rev. Stats. Chapter 607-A. (This is the Uniform Act on Status of Convicted Persons; New Hampshire is the only state to have yet adopted it.)

16. *New York* excludes those convicted of "bribery or of any infamous crime," N.Y. Const. Art. 2, § 3. But in June of 1973, New York amended its statutory exclusion to allow those persons whose maximum sentence of imprisonment has expired, or those who have been discharged from parole to vote. 17 McKinney Laws § 152.

17. *North Carolina* provides for disfranchisement of all persons judged guilty of a felony. N.C. Const. Art. VI, § 2. However, in 1973, North Carolina's Legislature enacted a statute providing that whenever an inmate is formally discharged from prison or a parolee is discharged from parole he "shall" be restored to all rights lost. N.C. Gen. Stat. § 13-1.

18. *Ohio's* Constitution at Article V, § 4, gives the general assembly the power to exclude those convicted of "bribery, perjury or other infamous crime." A recent amendment to Ohio codes, however, restores any rights lost upon conviction when the prisoner is either released from prison, after serving a maximum sentence, or released from parole. Ohio Rev. Codes § 2967.16.

19. *Oregon's* Article II, § 3 disfranchises upon conviction of a crime punishable by imprisonment in the penitentiary, but the Legislature has enacted a provision for automatic restoration while on probation or parole, and upon final discharge from parole or prison. Oregon Rev. Stats. §§ 137.240, 137.250.

20. *Pennsylvania's* Constitution, Article 7, § 1 provides the qualifications of electors and prescribes no disfranchising acts. Additionally, Penns. Codes Title 25, § 623-2(k), 951-2, 2602, and Title 19, § 893 make the fulfillment of a prison sentence the "equivalent" of a pardon by the governor.

21. *South Dakota* has a constitutional provision disqualifying those convicted of "treason or felony." South Dakota Const. Art. VIII, § 1. Nevertheless, the Legislature has codified both the suspension of civil rights while in prison, S.D. Code § 23-48-35, and the restoration of such rights upon discharge from prison or completion of sentence if on parole, S.D. Code § 24-5-2.

22. *Tennessee*—While the Tennessee Constitution allows the Legislature to disfranchise ex-felons, Art. IV, § 2, in 1973, the Legislature repealed the implementing statute that disfranchised those convicted of infamous crimes. Tenn. Code. Ann. § 2-205.

23. *Vermont* seemingly has no disqualifications based upon conviction of crime. Vermont Const. Chapter I, Art. 8, and Chapter II, § 32.

24. *West Virginia*—Article IV, § 1 of West Virginia's Constitution prohibits those persons who are "under conviction of treason, felony or bribery in an election." However, W.V.C. § 3-1-3 has been interpreted, in 1972, by the State to provide for automatic restoration upon completion of sentence or parole.

25. *Wisconsin* — Disfranchises those convicted of "treason or felony," unless restored to civil rights, Wisc. Const. Art. 3 § 2, W.S.A. 6.03(1)(b); but Wisc. Stats. § 57.078 restores civil rights upon completion of sentence.

FILED
DEC 28
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE

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Respondents.

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE

INTEREST OF AMICUS

The American Bar Association is a national organization of the legal profession. It has more than 155,000 members from all states and has for some years maintained an active interest in criminal justice improvement. One of its recent and more ambitious undertakings in this area has been the Project on Minimum Standards for Criminal Justice.

In 1970, the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services to address its growing interest in and commitment to the correctional phase of criminal justice administration. The Commission has undertaken a program to stimulate broadscale improvement in all aspects – legal and operational – of the nation's systems for correction and rehabilitation of criminal offenders. Among the Commission's several action projects is a Resource Center for Correctional Law and Legal Services concerned, among other things, with analysis and resolution of the growing number of legal and constitutional issues being raised in connection with the operation of correctional programs and systems. Focusing on the demands of both law and sound correctional practice, the Commission is anxious to contribute to full consideration of legal questions which bear significantly on the effectiveness and fairness of our correctional apparatus.

Sharing these interests are other major components of the American Bar Association, including the Young Lawyers Section and the Section of Individual Rights and Responsibilities. They join the Commission in submitting this brief on behalf of the Association to aid the Court in resolving the issues before it.*

SUMMARY OF ARGUMENT

This case presents difficult questions about the application of current Constitutional standards to state laws which restrict the fundamental right to vote. The Court is being

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* The Association has filed with the clerk of the Court letters from counsel for both parties consenting to the submission of this amicus curiae brief.

asked to determine whether the Supreme Court of California was correct when it found that provisions of the State Constitution disenfranchising persons convicted of "infamous crimes" or "high crimes" were in violation of the Equal Protection Clause of the Fourteenth Amendment, as applied to former felons whose sentences and periods of parole had expired.

While there is broad recognition today of the desirability of restoring rehabilitated offenders to the normal rights and privileges of citizens, including the right to vote, this case deals only with the Constitutional dimension of that goal, *i.e.*, the extent to which the Federal Constitution will tolerate disenfranchisement of former offenders who have rejoined the general class of citizens, and how established tests under the Equal Protection Clause for justification of voting restrictions apply to this class of citizens.

The issues are complicated by (i) special language in the Fourteenth Amendment which may warrant different treatment of the ex-offender class than groups affected by other kinds of voter eligibility requirements, and (ii) recent offender disenfranchisement cases, affirmed without opinion by this Court, which suggest that a separate standard or frame of reference may exist for measurement of ex-felon voting exclusions against Fourteenth Amendment guarantees. Only restrictions on the voting rights of discharged ex-felons are under review in this case, and not those of convicted persons still serving sentences, whether in prison or under parole, probation or other correctional supervision.

In the view of amicus, the judgment of the court below was correct. Because the right to vote is central in our representative government system, this Court has enunciated exacting tests for determining whether state classifications

which deny the franchise to certain groups of citizens and not others contravene the Equal Protection Clause. Briefly, these require the identification of a "compelling state interest" behind the exclusion and a determination that the exclusion is a necessary and not unduly burdensome method, among available alternatives, for adequately protecting that interest.

Amicus contends, first, that these tests presumptively are and should be applicable to classifications which deny ex-felons the right to vote. Whatever special considerations may exist for felons still under sentence, both the Constitutional priority for protection of voting rights and the language of the Equal Protection Clause warrant no exception for discharged ex-offender citizens.

Given the legitimacy of applying these Equal Protection standards, it appears clear that blanket restrictions disenfranchising all former felons are neither "necessary" nor "non-burdensome" methods of insuring the state's compelling interest in preservation of the integrity of the electoral process and the representative government framework of which it is an integral part. Indeed, in light of the current character of our election systems, contemporary balloting and voter registration machinery, and penal sanctions available for unlawful interference with the electoral and governmental processes, blanket disenfranchisement for felony violations would have difficulty meeting the "rational relationship" test which previously applied (*i.e.*, up to 1969) in determining the Constitutional appropriateness of voting restrictions. In asserting this infirmity for broad "felony", "high crime", "infamous crime" disqualifications, amicus expresses no judgment on whether laws disenfranchising ex-offenders for specific enumerated crimes related to the electoral or governmental process (*e.g.*, vote fraud,

bribery of officials, violence against or intimidation of candidates) would be Constitutional.

It has been asserted that ex-felon disenfranchisement may stand on a different Constitutional footing than other voter restrictions by virtue of special language in Section 2 of the Fourteenth Amendment. Section 2 reduces the basis of Congressional representation in states which deny the right to vote to male citizens "except for participation in rebellion, or other crime". The argument is that Section 1 (equal protection) could not have been intended to outlaw a discrimination which Section 2 (reduced representation penalty) expressly allows. This reasoning seems unsupported by either the language of the exception or its limited legislative history.

The legislative history of this Reconstruction measure offers no substantiation of an intent to establish a traditional felon disenfranchisement qualification in Section 2. If anything, it suggests a desire to validate disenfranchisement of those who participated in the rebellion or in related disloyal or seditious conduct. The phrase "or other crime", if literally interpreted to preclude Equal Protection scrutiny, would permit the untenable conclusion that a state could Constitutionally disenfranchise individuals even for such minor criminal misbehavior as traffic violations, petty gambling, etc. This Court cannot avoid interpretation of the "other crime" exception and should do so, in amicus' view, (i) in terms of the disloyal behavior rationale that seemed to motivate the phrase's coupling with "participation in rebellion" and (ii) without precluding Equal Protection examination of state ex-offender disenfranchisement laws.

Finally, the Court will need to consider its recent memorandum affirmances of disenfranchisement measures in North Carolina and Florida which were broadly applicable to felons, and Petitioner's assertion (grounded in *Green v. Board of Elections*) that the propriety of excluding felons from the franchise has been frequently articulated by this Court "as an example of what states may properly do". While the Florida and North Carolina decisions do indeed suggest an immunity from current Equal Protection standards for felon disenfranchisement, they should not be considered controlling. They did not involve full and reasoned analysis by this Court, and are distinguishable from the instant case. (One involved an incarcerated felon and the other applied the "rational relationship" test). The assertion that this Court has assumed the Constitutional legitimacy of offender disenfranchisement in numerous opinions is not well founded, since it is based on dicta and factual situations which are not pertinent to or consistent with today's tests of the Constitutional legitimacy of voter restriction measures.

For the Court to affirm a Fourteenth Amendment prohibition against blanket ex-felon disenfranchisement measures will do no harm to state interests in effective correctional administration. Such disenfranchisement cannot be shown to serve any significant rehabilitative purpose. Indeed, it has been the near unanimous position of correctional administrators, study commissions, law reform codes, and students of penology that restoration of offender civil rights serves the commitment to offender rehabilitation and reintegration that is now a basic tenet of every state correctional system.

ARGUMENT

I. CALIFORNIA'S DISENFRANCHISEMENT OF FORMER FELONS IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST AND THEREFORE DENIES EQUAL PROTECTION OF THE LAWS

There is no right more basic to our democratic form of government than the right to vote. Indeed, this Court has recognized that voting is perhaps the one right most fundamental to our system.[1] "Other rights, even the most basic, are illusory if the right to vote is undermined". *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because the provisions of California law challenged herein[2] deprive a class of

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[1] The fundamental nature of the right to vote has been expressed by the Court in numerous voting cases. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating Tennessee's one year residency requirement); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating a Texas primary filing fee system); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (provision limiting the vote on city general obligation bonds to landowners held unconstitutional); *Evans v. Cornman*, 398 U.S. 419 (1970) (invalidating a regulation limiting the vote on local revenue bonds to property taxpayers); *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (regulation limiting voting in school board elections to property owners, parents of school children and those leasing property in school district held unconstitutional); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (invalidating poll tax); *Carrington v. Rash*, 380 U.S. 89 (1965) (restriction of voting privilege of certain military personnel held unconstitutional). *See also* the reapportionment cases, *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962).

[2] California Constitution, Art. II, Section 3 and Art. XX, Sec. 11 with implementing legislation. These sections, respectively, mandate legislation to exclude persons convicted of "infamous crimes" or "high crimes" from the franchise. The exclusion also applies to

(continued)

citizens of this most fundamental of rights, their operation must withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

In *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972), this Court set forth the standard of review to be applied under the Fourteenth Amendment when testing the validity of state-imposed voting restrictions:

> ". . . if a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."

In enunciating this stringent test for reviewing voter classifications in *Dunn*, the Court went beyond the then existing standard which required the showing of a "rational relationship" between the classification and a legitimate

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2 (continued) certain enumerated offenses, e.g., misappropriation of public money, bribery, malfeasance in office, but the basic felony (infamous/high crime) exclusion is at issue in this case since the crimes of all individual respondents fell in this classification (*i.e.* robbery, burglary, drug use) and the class action was brought on behalf of disenfranchised felons generally. In *Otsuka v. Hite*, 64 Cal. 2d 596, 414 P.2d 412 (1966), the California Supreme Court construed the foregoing provisions as requiring an inquiry into the nature of the crime and, on that basis, determining whether the offender "may be reasonably deemed to constitute a threat to the integrity of the elective process." There was no attempt to delimit the meaning of "high crimes" or "infamous crimes" to specific felonies. The same court found this limitation of the disenfranchisement provisions inadequate under new equal protection standards and, in substance, reversed the *Otsuka* decision in the case at bar.

state purpose.[3] In so doing, it was following the logical course charted by previous cases dealing with the election process in general and voting in particular.[4]

The concept that a state no longer may invoke even a "compelling interest" to limit the right to vote without examining the necessity of the method used, was earlier established in *Kramer v. Union Free School District*, 395 U.S. 621 (1969):

> "For assuming, arguendo, that New York legitimately might limit the franchise in these school district elections to those 'primarily interested in school affairs', close scrutiny of the §2021 classification demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise . . . In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal." *Id.* at 632.

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[3] See *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), wherein the Court upheld a North Carolina literacy test because it found a relationship between the test and the state's interest in promotion of the intelligent use of the ballot. See also *Breedlove v. Suttles*, 302 U.S. 277 (1937), overruled by *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); and *Pope v. Williams*, 193 U.S. 621 (1904).

[4] See n. 1, *supra*. See generally, *Developments in the Law – Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

Dunn, which involved a Tennessee statute that required an eligible voter to be a state resident for one year or a county resident for 90 days, simply adopted, then, the *Kramer* standards of "necessity" and of statutory "precision" for the questioned classification. Significantly, *Dunn* also held that where fundamental rights are involved, states should pursue less rather than more burdensome ways of protecting the government interests involved.[5] It is against this exacting equal protection standard that the California Supreme Court in this case measured that State's constitutional and legislative prohibitions authorizing disenfranchising of former felons.

Petitioner, and the cases upon which she relies,[6] argue that restricting the right of former offenders to vote is necessary, as it must be under *Dunn*, in order to maintain the integrity of the electoral process. Apart from assertion of the historic exclusion of felons from the franchise under old "civil death" concepts, substantive justification seems to turn on the reasonableness of the state's judgment that

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[5] 405 U.S. 330, 343 (1972). The Dunn Court in discussing less restrictive alternatives, indicated that "Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared." *Id.* at 353.

[6] *Fincher v. Scott*, 352 F.Supp. 117 (M.D.N.C. 1972) *aff'd mem.* 411 U.S. 961 (1973); *Kronlund v. Honstein*, 327 F.Supp. 71 (N.D. Ga. 1971); *Beacham v. Braterman*, 300 F.Supp. 182 (S.D. Fla. 1969), *aff'd mem.*, 396 U.S. 12 (1969); *Green v. Board of Elections of the City of New York*, 380 F.2d 445 (2d Cir. 1967), *cert. den.*, 389 U.S. 1048 (1968); all applying the "rational relationship" test rather than the more exacting "necessary to a compelling interest" test enunciated in *Dunn v. Blumstein*, *supra*, and *Kramer v. Union Free School District*, *supra*.

perpetrators of serious offenses, given the heavy incidence of recidivism and organized crime now prevalent, should not be in the position to vote for public officials. Such voting is said to be particularly harmful with respect to officials such as legislators, judges, and prosecutors who will make or enforce the very laws under which the ex-felon's subsequent crimes may be tried. See *Green v. Board of Elections*, 380 F.2d 445 (1967), *cert. den.*, 398 U.S. 1048 (1968).[6.5] Furthermore, in the words of the Petitioner, if former offenders were permitted to vote:

> ". . . California would be in precisely the position of allowing ex-felons to vote for and conceivably be elected, if otherwise qualified, to the office of legislator, sheriff, district attorney, or judge. This situation would be intolerable." Petitioner's Brief at 10.

This potential harm from ex-offender enfranchisement is asserted because, under California legislation, a person can run for and be elected to any office for which he is an eligible voter.[7]

Several presumptions are implicit in the foregoing assertions. First is the presumption that former offenders as a group make poor or illegally motivated voters, and, as voters, would have a significant impact on the election results for legislators, judges, and prosecutors; second, that they are more likely candidates for commission of election

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6.5 But see E. du Fresne and W. du Fresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges:" Beyond Green v. Board of Elections of New York City*, 19 DePaul L. Rev. 112 (1969).

7 Cal. Govt. Code §275 (West 1966).

fraud offenses; and, third, that released offenders, if elected to office, would make untrustworthy public servants. As to the last, the question of disqualification of former felons to hold public office is an issue distinct from the voting rights question presented in this case. The State of California is not without means to provide separate standards and eligibility requirements as to the rights of ex-offenders to hold public office. While these too may be called to pass Constitutional muster, it is quite possible that different standards, methods, and results would emerge in balancing state and citizen interests.

As to the other justifications, no empirical evidence has been shown, nor indeed can it be, that "catch alls" embracing the wide variety of offender types and behaviors embraced in "felon" or "infamous crime" classifications are necessary or, indeed, reasonably calculated to forestall against the propensity of some offenders to abuse the franchise or recidivate to illegal acts which undermine the governmental process. Although these concerns seem to pertain to protection of the "purity of the ballot box," the 9th Circuit in *Dillenburg v. Kramer*, 469 F.2d 1222, 1224-25 (1972), has, like the Supreme Court of California, expressed its difficulty in discerning the nature of the interest served:

> ". . . Search for modern reasons to sustain the old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process (*e.g.*, Green v. Board of Elections of City of New York (2d Cir. 1967) 380 F.2d 445, 451, cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840)

> or a quasi-metaphysical invocation that the interest is preservation of the "purity of the ballot box". (*E.g.*, Washington v. State (1884) 75 Ala. 582, the venerable sire of abundant progeny; *cf.* Kronlund v. Honstein (N.D. Ga. 1971) 327 F.Supp. 71, 73.)
>
> "Few decisions have penetrated the disenfranchisement classification to ascertain whether the offenses that restrict or destroy voting rights have anything to do with the integrity of the electoral process or whether there is any constitutionally valid distinction between the class of offenses that disenfranchise and the class of offenses that do not. When the facade of the classification has been pierced, the disenfranchising laws have fared ill. (*E.g.*, Stephens v. Yeomans, D.N.J. 3-judge court 1970) 327 F.Supp. 1182; Otsuka v. Hite, (1966) 64 Cal. 2d 596, 51 Cal. Rptr. 284, 414 P.2d 412)."

Nor is it Respondent's burden to rebut these presumptions. This Court, in dealing with statutory presumptions in the past, has indicated that governmental authority imposing the presumption must establish its validity by showing that "the presumed fact is more likely to flow from the proved fact on which it is made to depend". *Leary v. United States*, 395 U.S. 6, 36 (1969). Yet, Petitioner has failed to establish, by empirical proof or otherwise, any rational connection between the fact of felony conviction and commission of election fraud or other crimes destructive of the governmental process. Rather, the presumption that former felons will be likely candidates for

election offenses punishes the ex-offender in advance, without credible evidence to support such probability.

Further, even assuming that a correlation between conviction and election crimes could be shown, states have at their disposal "less drastic means" than disenfranchisement of all felons to protect their interests. Virtually every state has a variety of criminal statutes dealing with election code offenses. As the California Supreme Court has stated in this case, "the voting and counting process is now thoroughly hemmed in by control mechanisms at every stage so that deliberate irregularities, if present today, are rare and have negligible effects on election results . . ." *Ramirez v. Brown*, 9 Cal.3d 199, 215 (1973). The California Court also observed:

> "In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squad of computer technicians." *Id.* at 214.

Finally, the proffered explanations for disenfranchisement fail to account for (i) the absence of former felon disenfranchisement provisions in many states, (ii) the ability of states to impose as severe and comprehensive a set of criminal snactions as may be desired to protect against damage to or corruption of the electoral or political process, and (iii) the existence in several states of election code provisions, which are misdemeanors

and which do not impose the consequence of disenfranchisement.[8] These alternatives, already employed by states no less concerned than California with safeguarding their electoral processes, suggest that viable and less drastic means do indeed exist for protecting state interests.

The classification involved in the instant case is devoid of relationship to the crime or public dangers protected against. Neither is it based on any qualities of the offender; rather, "it rests solely on the nature of the punishment that can be given for an offense". *Dillenburg v. Kramer, supra,* at 1225. Therefore, it cannot be said that the state has tailored its classification with sufficient precision to meet the exacting standard of the Equal Protection Clause. Just as "wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process", *Harper v. Virginia Board of Elections,* 383 U.S. 663, 667 (1966), neither can the fact of prior felony conviction, standing alone, be justified as a total bar to the exercise of this most fundamental right.

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[8] *See, e.g.,* Wash. Rev. Code §29.85.050 (fraudulently misleading voters in marking ballots); Wash. Rev. Code §29.85.060 (voter coercion by election official); Wash. Rev. Code §29.85.020 (tampering with ballots by election officer), cited in *Dillenburg v. Kramer,* 469 F.2d 1222, n. 6 (1972). Indeed, this is true in California itself where ". . . at least 60 additional acts are punished as misdemeanors in 40 separate sections." *Ramirez v. Brown, supra* at 215.

II. SECTION 2 OF THE FOURTEENTH AMENDMENT IS NOT AN INDEPENDENT GRANT OF AUTHORITY TO STATES TO DISENFRANCHISE FORMER OFFENDERS

Although a blanket prohibition on voting by ex-offenders should fail under the Equal Protection Clause, both the Petitioner[9] and the State of California[10] argue that Section 2 of the Fourteenth Amendment expressly reserves to states the power to withhold the franchise from former offenders. Section 2 provides in pertinent part:

> ". . . But when the right to vote is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced . . ." (Emphasis added)

A. Neither the language of Section 2 nor its legislative history support the view that it was meant to establish a discrimination not susceptible to equal protection scrutiny

The proviso "except for participation in rebellion, or other crime" is part of a general penalty clause and must be read in that context. Section 2 penalizes, by reduced representation in the House of Representatives, states which deny the vote to eligible persons. It also provides that states which deny the vote to persons who have participated

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[9] Petitioner's Brief at 20.

[10] Brief of State of California as *Amicus Curiae* at 13.

in "rebellion, or other crime" will not be so penalized. Only by reading into Section 2 an intent not evident from the words themselves may one conclude that states are affirmatively authorized to exclude former offenders from exercising the franchise.

To accord the phrase "or other crime" the meaning ascribed by Petitioner would suggest that states might deny the vote to individuals convicted of such misdemeanors as traffic offenses, trespass and littering ordinances, minor vandalism and similar infractions. (Unlike the Fifth Amendment reference to "infamous crimes", the Section 2 reference to "other crime" is not in any way limited.)[11] Such reasoning, of course, would produce an overbroad and irrational result. This result can be avoided but it makes clear the need to go beyond a literal reading of the "other crime" phraseology as an affirmative authorization.

Even if this Court were to conclude that Section 2 is an affirmative grant of authority to exclude criminals from the franchise, rather than an exception from a penalty provision, the issue of extent and duration of such disenfranchisement would remain. Where different sections of a constitutional provision are enacted contemporaneously, as with Sections 1 and 2 of the Fourteenth Amendment, the favored course is to interpret such provisions so that they may be read together harmoniously and without giving such force to one that it excludes the other.[12] In the instant case, such a reading is not only possible, but it produces, in the view of amicus, a more logical and

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[11] Black's *Law Dictionary* 444 (4th ed. 1951). In technical usage, the general term "crime" includes misdemeanors.

[12] 16 Am. Jur.2d *Constitutional Law* §§66, 67, 76 (1964) and cases cited therein.

Constitutionally secure result. This course was followed in *Stephens v. Yeomans*, 327 F.Supp. 1182 (D.N.J. 1970). There the court found (at p. 1186):

> "... [The phrase "participation in rebellion or other crime] is an express exception or proviso in section 2, which in its general terms imposes a penalty on those states which disenfranchised for reasons other than rebellion or crime. Since it is now clear that the entire section 2 imposes no limitation on section 1, it can hardly be argued that the exception or proviso in section 2 was intended to impose such a limitation. We conclude, therefore, that the New Jersey statute which disenfranchises plaintiff must be judged by the exacting equal protection standards laid down by the Supreme Court in the voter disqualification cases referred to hereinabove."

Put to that test, disenfranchisement of persons guilty of minor violations, or the continuance of a valid disenfranchisement beyond the full term of a felon's sentence, should fail. It is difficult to regard this as anything but an unnecessarily drastic means of protecting a compelling state interest, even under the old "rational relationship" test.

The full intent of Section 2 is not revealed from its language and resort to legislative history is therefore necessary. The historical record on enactment of the Fourteenth Amendment shows that early drafts of Section 2 contained no language concerning exceptions to the penalty for a state's disenfranchisement of qualified voters. Such drafts

initially imposed the penalty only with respect to denial of the vote on grounds of race or color. When the Amendment was later broadened to impose the penalty on states which abridged the franchise on any grounds, the exception relating to participation in rebellion was added. Nowhere is there clear indication of what the words "or other crime" were to mean. Indeed, the only indicator is the common practice at the time, by the drafters and others, to equate "crime" with misconduct which might reasonably be expected of Confederates in the wake of defeat by the North. This explains why the phrase "or other crime" follows close on the heels of the word "rebellion."

> "Furthermore, the crucial words 'or other crimes' are utterly devoid of independent legislative intent, and take on historical meaning only as part of the phrase 'participation in rebellion, or other crime.' Proposed § 2 (H.R. 51, 39th Cong., Sess. (1866)) was sent to a Joint Committee with the phrase 'participation in rebellion.' *CONG. GLOBE*, 39th Cong., 1st Sess. 1289 (1866). It is clear that the thrust of this language was to limit governmental activity by former rebels. *See* H.R. Rep. 30, 39th Cong., 1st Sess. 14, 15 (1866). The final version of the bill (H.R. 127, 39th Cong., 1st Sess. (1866)), however, was reported out six weeks later with the language 'or other crime' tacked on. There is no apparent legislative intent for this addition, and it makes sense only as giving the states a broader weapon to use against former Confederates." [13]

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[13] Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 Am. Cr. L. Rev. 720, 746 n. 158 (1973).

It seems, therefore, that the operative intent, if any, in use of the phrase "other crime" was to validate disenfranchisement of Confederate officials and sympathizers for a variety of offenses and outlawed political activities related to the rebellion, *i.e.* violations which the phrase "participation in rebellion" might not technically encompass. An interpretation of this kind would comport with the recognized "ejusdim generis" concept under which general words and phrases ("or other crime") following words of specific meaning ("rebellion") are not construed in their widest extent but rather within the same general class or category as the specific reference.

B. Prior judicial interpretations of the effect of section 2 on offender voting restrictions were not well reasoned, are distinguishable from this case, and should not be deemed binding.

The assertion that Section 2 may be read to exclude former offenders from the right to vote is not without precedent. The cases on which Petitioner relies generally support this interpretation and two of them have been affirmed by this Court in response to its obligatory appellate jurisdiction.[14] *Fincher v. Scott*, 352 F.Supp. 117 (M.D.N.C. 1972), *aff'd mem.*, 411 U.S. 961 (1973), and *Beacham v. Braterman*, 300 F.Supp. 182 (S.D. Ga. 1969), *aff'd mem.*, 396 U.S. 12 (1969).

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14 "A summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance. (Frankfurter & Landis, 'The Business of the Supreme Court at October Term 1929' (1930) 44 Harv.L.Rev. 1, 14. *See also* Serrano v. Priest (1971) 5 Cal.3d 584, 616-617, 96 Cal.Rptr. 601, 624, 487 P.2d 1241.)" *Dillenburg v. Kramer*, *supra* at 1225.

In *Fincher*, North Carolina's constitutional and statutory provisions disenfranchising prisoners were upheld. The lower court found that Section 1 of the Fourteenth Amendment must be read in light of Section 2 which "expressly allows the exclusion of felons from the franchise." See also, *Green v. Board of Elections, supra*, and *Beacham v. Braterman, supra*.

However, well reasoned and contrary authority exists, whose analysis of current equal protection standards and the realities of ex-felon/electoral system relationships have not been adequately answered. See the decision of the California Supreme Court in this case, *Ramirez v. Brown, supra; Stephens v. Yeomans*, 327 F.Supp. 1182 (D.N.J. 1970); *Dillenburg v. Kramer, supra*.

Initially, it should be noted that neither *Fincher* or *Beacham*, nor *Green* (which appears to be the intellectual wellspring of the other cases) received plenary consideration by this Court. Thus, they may be regarded as having "little precedential significance," *Dillenburg v. Kramer, supra* at 1225. Further, none of these cases, as well as others relied on by Petitioner, is as broad as Petitioner asserts. *Fincher* dealt only with the right to vote of an incarcerated felon,[15] whereas the present case involves the voting rights of persons who have completed their sentence, whether on probation or in confinement and subsequently on parole. Insofar as it examined disenfranchisement directly, rather than the more extensively discussed pardon power of the Florida Governor, *Beacham* cited and relied

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[15] Jurisdictional Statement, *Fincher v. Scott, supra* at 6, 7, 18, 20. Conversation with Norman B. Smith, counsel for Fincher, December 17, 1973.

only on *Green*. Similarly, *Green* is distinguishable from the instant case. First, and most significantly, it relied on the rational relationship test which no longer suffices to justify voting restrictions imposed on special classes or groups of citizens. Further, the precise question before the Second Circuit was procedural, concerning the criteria for convening a three-judge court to determine the constitutionality of certain New York disenfranchisement statutes. Moreover, the plaintiff in *Green* had been convicted of the type of offense which, a century earlier, would have been characterized as rebellious or seditious behavior under Section 2.

Beyond these differences, examination reveals that the lower court opinions in these cases offer little analysis as to why their reading of Section 2 was proper. Indeed, such analysis reveals that there are alternative readings which achieve a fair and just result, and which comport with the rules of Constitutional construction.

In *Fincher v. Scott, supra*, the cursory treatment accorded Section 2 may be laid to that Court's willingness to accept, at face value, the meaning given to the proviso "except for participation in rebellion, or other crime" almost ninety-nine years earlier in *United States v. Anthony*, 24 Fed. Cas. No. 14,459, p. 829 (C.C.N.D.N.Y. 1873) (criminal proceeding involving the defense of an asserted Constitutional right to vote for women citizens). However, in *Anthony*, the court discussed the meaning of Section 2 in even more summary fashion than *Fincher*, using it only to demonstrate that the Section assumed the right of states to deny the vote to certain classes of citizens:

> "This view is *assumed* in the second section of the fourteenth amendment which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section *assume* that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby *conceded* to the states as a state's right." *United States v. Anthony, supra* at 831. (Emphasis added)

Likewise, in *Green v. Board of Elections, supra,* analysis of Section 2 is absent.

In sum, the exact meaning of the proviso in question has never been considered by the courts which purported to construe its meaning. Rather, the exclusionary interpretation was assumed without the scrutiny of legislative history and contextual significance merited by an issue of this magnitude.

III. ACTIONS TAKEN BY THOSE CONCERNED WITH CRIMINAL JUSTICE, RECENT STATE LEGISLATIVE ACTIVITY, AND POSITIONS ADOPTED BY GROUPS CONCERNED WITH THE ELECTORAL PROCESS, CONFIRM THAT THERE IS NO JUSTIFICATION FOR DENYING FORMER FELONS THEIR FUNDAMENTAL RIGHT TO VOTE

The Constitution is a living document that, historically, has enabled this Court to maintain a proper balance between fundamental changes in our society and its institutions, and traditional legal concepts. Nowhere has this flexibility been more consistently demonstrated than in the context of voting rights.

> ". . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . Notions of what constitutes equal treatment for purposes of the Equal Protection clause do change." *Harper v. Virginia Board of Elections, supra* at 669.

Thus, when faced with state classifications that seek to disenfranchise selected groups of citizens, it becomes crucial that this Court examine the rationale behind the exclusion, and whether the rationale retains validity in modern society.

In its origins, penology stressed the need to impose severe physical penalties on lawbreakers. Severe penalties were deemed necessary for society to achieve retribution for the wrongful act and to deter others from committing

similar offenses.[16] So also was the imposition of various civil disabilities, collectively known as "civil death" provisions, thought to be an effective means of punishment.

These theories of crime and punishment were carried over to this country with the colonists, and although our Constitution prohibited certain of the more drastic penalties for commission of crime,[17] the penalty of "civil death" persisted. The penal philosophy which gave life to such onerous sanctions remained virtually unchallenged until the last half of the nineteenth century when a meeting of the National Congress on Penitentiary and Reformatory Discipline (now the American Correctional Association) adopted an historic Declaration of Principles. It was asserted among other things that:

> "The supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering."[18]

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16 ". . . The early penal systems were designed for two purposes – to exact vengeance on wrongdoers and to deter other potential offenders. With those objectives, the penalties had to be brutal and they had to be widely observed, the only limiting factor being the tolerance of the community." Babington, *The Power to Silence*, 164 (1968).

17 See, Art. III, §3 of the United States Constitution (specifically prohibiting forfeiture and corruption of blood except during the life of a person convicted of treason), and the Eighth Amendment (prohibiting infliction of punishments which are "cruel and unusual").

18 Art. III of the Declaration of Principles (1870), reprinted American Bar Association and Council of State Governments, *Compendium of Model Correctional Legislation and Standards*, X-65 (1972).

Gradually, increasingly numbers of experts and administrators in the field of corrections have embraced this policy as the most promising means of dealing with crime and reducing recidivism.[19] Today such acceptance is almost universal. The underlying philosophy has also been endorsed by the nation's highest elected officials:

> "Locking a convict up is not enough. We must also offer him the keys of education, of rehabilitation, of useful training, of hope – the keys he must have to open the gates to a life of freedom and dignity."[20]

The emphasis of our nation's correctional programs likewise reflects the view that, while punishment may be a necessary evil of the correctional process, the goal of rehabilitation of offenders should be paramount. The wide range of programs and methods of treatment now flourishing either within, or as an adjunct to, the correctional process, bears witness to this view. Although problems of implementation and inadequate resources are quite real, vocational training, counselling, and treatment for alcohol and drug addiction are today considered an integral part of the prison regimen. Similarly, increased reliance on community correctional programs such as halfway houses, work release programs and probation and parole signals a

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19 ". . . The ultimate goal of corrections under any theory is to make the community safer by reducing the incidence of crime. Rehabilitation of offenders to prevent their return to crime is in general the most promising way to achieve this end." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, 16 (1967).

20 Remarks of President Richard M. Nixon, First National Conference on Corrections, Williamsburg, Va., December 6, 1971.

dramatic departure from past willingness to segregate even harmless offenders from society-at-large.[21] There have been an increasing realization that society must either responsibly assume the burden of preparing offenders for productive citizenship (especially those whose debt has been fully paid) or reap a harvest of alienation and despair from those it has abandoned.

Despite agreement on the appropriateness of affirmative efforts to rehabilitate and reintegrate offenders into society, a number of states, including California, persist in denying to former offenders the fundamental right to vote. Virtually every national group which has examined this question has recognized the counterproductive nature of the practice. The most recent of these, the National Advisory Commission on Criminal Justice Standards and Goals, reached a similar conclusion:

> "Loss of citizenship rights – the right to vote, hold public office, and serve on juries – inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest." *Report on Corrections*, 593 (1973).

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[21] National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections* (1973). A variety of standards are relevant, including especially: 2.9 – Rehabilitation; 2.10 – Retention and Restoration of Rights; 3.1 – Use of Diversion; 4.9 – Programs for Pretrial Detainees; 5.2 – Sentencing the Nondangerous Offender; 6.1 – Comprehensive Classification Systems; 7.1 – Development Plan for Community-Based Alternatives to Confinement; See also Chapters 10 (Probation), 11 (Major Institutions), 12 (Parole) and 16 (Statutory Framework of Corrections).

Other groups intrinsically concerned with electoral and governmental processes, such as the National Democratic Party [22] and the California League of Women Voters, [23] have specifically adopted as policy the position that restrictions on the right to vote of former offenders should be abolished. The President's Commission on Law Enforcement and Administration of Justice was no less explicit in its 1967 appeal for restoration of the franchise to former offenders.

> "There seems to be no justification for permanently depriving all convicted felons of the vote, as the laws in most states provide. The convicted person may have no strong personal interest in voting, but to be deprived of the right to representation in a democratic society is an important symbol. Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote." [24]

Further, various model acts and suggested legislation propose abolition of restrictions on ex-offenders' voting rights. The American Bar Association has approved legislation developed by the National Conference of Commissioners on Uniform State Laws which would restore an offender's

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[22] In its *Party Platform:* 1972, the Democratic Party endorsed ". . . restoration of civil rights to ex-convicts after completion of their sentences, including the right to vote."

[23] ". . . the right to vote should be restored to ex-felons," California League of Women Voters, *Policy Statement,* February 16, 1972.

[24] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections,* 90 (1967).

right to vote upon his discharge from sentence or if placed on probation or parole. *Uniform Act on the Status of Convicted Persons*, §§2, 3 (1965). A similar position was incorporated by the American Law Institute in the *Model Penal Code:*

> "§306.3 Notwithstanding any other provision of law, a person who is convicted of a crime shall be disqualified (1) from voting in a primary or election if and only so long as he is committed under a sentence of imprisonment."

Legislatures in a growing number of states have recognized the wisdom of this view and have been moving to eliminate voting restrictions placed on ex-felons. Four states—Arkansas, Maine, Michigan, and Tennessee—now have no restrictions while others provide for automatic restoration of voting rights.[25] Such actions reflect a trend that is unmistakable.[26]

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[25] See Appendix A of this brief for state law disenfranchisement provisions. See Appendix B of this brief for provisions respecting re-enfranchisement. Nineteen states automatically restore civil rights upon termination of imprisonment, parole or probation while five more states and the District of Columbia restore rights after a fixed period of time. *Restoring the Ex-Offender's Right to Vote: Background and Development*, 11 Am. Crim. L. Rev. 721, 758 and n. 215, *et seq.* California's procedure (Petitioner's brief at pp. 21-24 and Appendix A thereof) is more cumbersome, requiring an application, a judicial proceeding, and a discretionary determination based on no more explicit standard than "rehabilitation and fitness to exercise all of the civil and political rights of citizenship."

[26] The National Advisory Commission on Criminal Justice Standards and Goals has called for all states to enact by 1975 legislation removing all mandatory restrictions on ex-offender civil and political rights, including the right to vote and hold public office. *Report on Corrections*, Standard 16.17 (1973).

The purpose of corrections has shifted from one of thoughtless retaliation to that of attempting to prepare the offender for lawful participation in society. However, at the same time that millions of dollars are being spent to implement this program, with unprecedented commitment of federal, state, and local resources to that end, laws grounded in the antiquities of penology conflict with today's goals of rehabilitation and reintegration. If the strength of democratic government is truly drawn from its collective citizenry, surely those who have endured its sanctions deserve also to participate in its most valued entitlements. As de Tocqueville once noted:

> "There is no more invariable rule in the history of society: the further electoral rights are extended the greater is the need for extending them; for after each concession the strength of democracy increases, and its demands increase with its strength." *Democracy in America*, 57 (Knopf 1956).

CONCLUSION

For the above reasons, the American Bar Association respectfully urges this Court to affirm the decision of the Supreme Court of California.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Chesterfield Smith, attorney for amicus, hereby certify that 3 copies of this brief were duly served upon attorneys for both parties by mail service, postage pre-paid.

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Chesterfield Smith

APPENDIX A

TABLE I
STATE DISENFRANCHISEMENT PROVISIONS

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Alabama		√	√	√	√		√	√
Alaska	√					√	√	
Arizona	√					√*		√
Arkansas	√[E]							
California		√		√		√*		
Colorado						√*		
Connecticut	√			√[E]				
Delaware	√				√	√*		
District of Columbia	√							
Florida	√					√*		
Georgia			√	√			√	√
Hawaii	√							
Idaho	√	√		√	√			√

E: enabling provision

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Illinois	√					√*		
Indiana	√	√E			√	√*		
Iowa		√			√			
Kansas	√			√			√	√
Kentucky	√			√E	√	√*		√
Louisiana	√					√*	√	
Maine					√E			
Maryland		√		√	√			
Massachusetts					√			
Michigan						√*E		
Minnesota	√	√E		√E				√
Mississippi				√				
Missouri	√			√	√	√*	√	

E: enabling provision

TABLE I—*Continued*

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Montana	√							
Nebraska	√							√
Nevada	√			√				√
New Hampshire				√	√	√		√
New Jersey				√[E]		√		
New Mexico	√	√						
New York	√	√		√	√			
North Carolina	√						√	
North Dakota	√				√			√
Ohio	√	√[E]		√[E]				
Oklahoma	√					√*		
Oregon						√	√	
Pennsylvania					√			

E: enabling provision

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Rhode Island		√		√			√	
South Carolina				√	√			√
South Dakota	√					√*		
Tennessee		√E		√				
Texas	√				√	√*		√
Utah					√			
Vermont								
Virginia	√							
Washington		√			√			√
West Virginia	√			√	√			√
Wisconsin	√	√						
Wyoming	√	√						

E: enabling provision

APPENDIX B

TABLE II

STATE PROVISIONS FOR RESTORATION OF VOTING RIGHTS

State	Automatic Restoration [222]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period; Only Certain Offenses [223]	Pardon By Governor [226]	Other Procedures [227]
Alabama					√
Alaska				√	√
Arizona				√	√
Arkansas				√	√
California				√	√
Colorado	√			√	√
Connecticut				√	√
Delaware	√		√	√	√
District of Columbia		√			
Florida	√			√	√
Georgia				√	√
Hawaii	√			√	√
Idaho				√	√

E: enabling provision

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Illinois	√				
Indiana		√		√	
Iowa			√	√	
Kansas	√			√	
Kentucky			√	√	
Louisiana				√	
Maine		√[E]		√	
Maryland				√	
Massachusetts		√		√	
Michigan				√	
Minnesota	√			√	
Mississippi					√
Missouri			√	√	√

E: enabling provision

TABLE II—*Continued*

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Montana	√			√	
Nebraska	√			√	√
Nevada				√	√
New Hampshire	√				√
New Jersey	√			√	
New Mexico				√	
New York	√			√	
North Carolina		√		√	
North Dakota				√	√
Ohio	√			√	
Oklahoma				√	
Oregon	√			√	

E: enabling provision

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Pennsylvania		√		√	
Rhode Island				√	√
South Carolina					√
South Dakota	√			√	
Tennessee				√	√
Texas				√	
Utah					√
Vermont		√		√	
Virginia				√	
Washington	√			√	
West Virginia	√			√	
Wisconsin	√			√	
Wyoming	√			√	

E: enabling provision

NOTES TO TABLES

[213] ALASKA CONST. art. V, § 2 (felonies involving moral turpitude); ALASKA STAT. § 15.05.030 (1971); ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. §§ 16–101, 16–921 (Supp. 1972–1973); ARK. CONST. amend. 8, art. 3, § 1 (enabling provision); 16–150, CONN. GEN. STAT. ANN. § 9–46 (1967) (except the crime of non-support); DEL. CONST. art. V, § 2 (accompanied by an enabling clause which permits the General Assembly to disenfranchise as punishment for crime); D.C. CODE ANN. § 1–1102 (Supp. 1973); FLA. CONST. art. VI, § 4; FLA. STAT. ANN. § 97.041 (Supp. 1973); HAWAII CONST. art. II, § 2 (Supp. 1971); HAWAII REV. STAT. § 716–2 (Supp. 1971); IDAHO CONST. art. VI, § 3 (Supp. 1972); IDAHO CODE § 34–403 (Supp. 1972); ILL. CONST. art. 3, § 2; IND. STAT. ANN. § 29–5964 (1964 Replacement); KAN. CONST. art. 5, § 2; KY. CONST. § 145; LA. CONST. art. VII, § 1; LA. CONST. art. VIII, § 6; LA. REV. STAT. tit. 15, § 572.1 (Supp. 1971); MINN. CONST. art. 7, § 2; MO. CONST. art. 8 § 2; MO. REV. STAT. § 111.021 (Supp. 1973); MO. REV. STAT. § 113.040 (1966); MONT. CONST. art. IX, § 2; MONT. REV. CODE § 23–2701 (Supp. 1971); NEB. CONST. art. VI, § 2; NEB. REV. STAT. § 29–112 (1964); NEV. CONST. art. II, § 1; N.M. CONST. art. VII, § 1; N.M. STAT. ANN. § 40A–29–14 (1964); N.Y. ELECTION LAW §§ 152, 462 (McKinney Supp. 1972–1973); N.C. CONST. art. VI, § 2(3); N.D. CONST. art. V, § 127; N.D. CENT. CODE § 16–01–04 (1971 Replacement); OHIO REV. CODE ANN. § 2961.01 (1954); OKLA. CONST. art. III, § 1 ("subject to such exceptions as the legislature may prescribe"); S.D. CONST. art. VII, § 8; TEX. CONST. art. 6, § 1; TEX. ELECTION CODE art. 5.01 (1967 rev. ed.); VA. CONST. art. II, § 1; VA. CODE ANN. § 24.1–42 (Supp. 1972); W. VA. CONST. art. IV, § 1; W. VA. CODE ANN. § 3–1–13 (1971); WISC. CONST. art. III, § 2; WISC. STAT. ANN. § 6.03 (1967); WYO. STAT. § 6–4 (1959).

[214] ALA. CONST. § 182; ALA. CODE tit. 17, § 15 (1958); CAL. CONST. art. II, § 1; IDAHO CONST. art. VI, § 3 (Supp. 1972); IND. CONST. art. 2, § 8 (enabling provision); IOWA CONST. art. 2, § 5; MD. CONST. art. 1, § 2 (enabling provision); MD. REV. STAT. ANN. art. 33, § 3–4, as amended, ch. 667 (Laws of Md. of 1972); MINN. CONST. art. 4, § 15 (enabling provision); N.M. CONST. art. VII, § 1; N.Y. CONST. art. II, § 3; OHIO CONST. art. V, § 4 (enabling provision); R.I. CONST. amend. 24, § 4; TENN. CONST. art. I, § 5 (enabling provision) (*see* note 203 *supra* and accompanying text); TENN. CONST. art. IV, § 2 (enabling provision); WASH. CONST. art. 6, § 3; WISC. CONST. art. III, § 6 (enabling provision); WYO. CONST. art. 6, § 6.

[215] ALA. CONST. § 182; GA. CONST. § 2–801.

[216] ALA. CONST. § 182 ("murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, . . . any person who shall be convicted as a vagrant or tramp. . . ."); ALA. CODE, tit. 17, § 15 (1958) (same in substance as constitution); CAL. CONST. art. II, § 1 (embezzlement, misappropriation of public money); CAL. CONST. art. XX, § 11 (bribery, perjury, forgery, malfeasance in office, or other high crimes); CAL. PENAL CODE §§ 228, 232 (1970) (duelling); CONN. CONST. art. VI, § 3; GA. CONST. § 2–801 (embezzlement of public funds, malfeasance in office, bribery or larceny); IDAHO CONST. art. VI, § 3 (Supp. 1972) (bigamy, polygamy); KAN. CONST. art. 5, § 2 (defrauding the government, bribery); KY. CONST. § 145 ("such high misdemeanors as the general assembly may declare"); KY. REV. STAT. § 432.350 (1969) (state official who receives a bribe); KY. REV. STAT. § 436.230 (1969) (bribery); MD. REV. STAT. ANN. art. 33, § 3–4, *as amended* ch. 667 (Laws of Md. of 1972) (larceny); MINN. CONST. art. 4, § 15 (bribery, perjury); MISS. CONST. art. 12, § 241 (murder, rape, bribery, theft, arson, obtaining money under false pretense, perjury, forgery, embezzlement or bigamy); MISS. CODE § 23–5–85 (1972) (same in substance as constitution); MISS. CODE § 99–19–35 (1972) (same in substance as constitution); MO. REV. STAT. § 557.490 (1953)

(perjury); MO. REV. STAT. § 559.470 (1953) (murder and other felonies involving physical assault); MO. REV. STAT. § 560.610 (Supp. 1973) ("any person who shall be convicted of arson, burglary, robbery or the stealing of any motor vehicle, narcotic drug, horse, mare, gelding, colt, filly, mule, dog, ass, sheep, goat, hog, meat cattle, domestic fowl in the nighttime, deed, will, court record, anything of the value of fifty dollars or more, or anything from a dwelling or from the person. . . ."); MO. REV. STAT. § 561.340 (Supp. 1973) (false acknowledgment of deed: affixing false jurat, certain felonies dealing with forgery and related offenses); NEV. CONST. art. XV, § 3 (duelling); N.H. CONST. pt. 1, art. II (bribery); N.J. CONST. art. II, § 7 (legislature may disenfranchise those convicted of "such crimes as it may designate"); N.Y. CONST. art. II, § 3 (bribery); OHIO CONST. art. V, § 4 (bribery, perjury); R.I. CONST. amend. 24, § 4 (bribery); S.C. CONST. art. II, § 6 ("persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny. . . ."); S.C. CODE ANN. § 23–62 (Supp. 1971) (same in substance as constitution); S.C. CODE ANN. § 16–61 (1962) (duelling); TEX. CONST. art. 16, § 2 ("bribery, perjury, forgery, or other high crimes"); WIS. CONST. art. III, § 6 (bribery, larceny); WIS. STAT. ANN. § 6.03 (1967) (bribery).

[219] ALA. CONST. § 182; ALA. CODE tit. 17, § 15 (1958); DEL. CONST. art. V, § 2; DEL. CODE ANN. tit. 15, § 1701 (Non-cum. Supp. 1972); IDAHO CONST. art. VI, § 3 (Supp. 1972); IDAHO CODE § 34–403 (Supp. 1972); ILL. ANN. STAT. ch. 46, § 29A–5 (Smith-Hurd Supp. 1972) (if sentenced to penitentiary); IND. STAT. ANN. §§ 29–5908, 29–5964, 29–5965 (1969 Replacement); IOWA CODE § 51.16 (1949); KY. CONST. § 145; KY. REV. STAT. §§ 124.150, 124.190, 160.991 (1971); ME. CONST. art. IX (enabling provision); MD. REV. STAT. ANN. art. 33 §§ 3–4, *as amended*, ch. 667, (Laws of Md. of 1972); MASS. CONST. amend. art. III; MASS. GEN. LAWS ch. 51, § 1 (Supp. 1973); MASS. GEN. LAWS ch. 55, § 37 (1958); MO. CONST. art. 8, § 2; MO. REV. STAT. § 111.021 (Supp. 1973); MO. REV. STAT. §§ 113.040, 129.420, 129.490, 129.500, 129.920 (1966); N.H. CONST. pt. I, art. 11; N.Y. ELECTION LAW § 152 (McKinney Supp. 1972–1973); N.D. CENT. CODE § 12–11–06 (1960); PA. CONST. art. VII, § 7 (only disenfranchises for the election in which crime committed); PA. STAT. ANN. tit. 25, § 3552 (1963) (only disenfranchises for four years); S.C. CONST. art. II, § 6; S.C. CODE ANN. § 23–62 (Supp. 1971); UTAH CONST. art. IV, § 6, VT. CONST. ch. II, § 51; W. VA. CONST. art. IV, § 1; W. VA. CODE ANN. § 3–1–13 (1971); WIS. CONST. art. III, § 6 (enabling provision); WIS. STAT. ANN. § 6.03 (1967).

[220] ALASKA STAT. § 11.05.070 (1970); ARIZ. REV. STAT. ANN. § 13–1653; CAL. PENAL CODE § 2600 (1970); COLO. CONST. art. VII, § 10; COLO. REV. STAT. ANN. § 49–3–2 (Perm. Cum. Supp. 1971); DEL. CODE ANN. tit. 11, § 4347 (Supp. 1970); FLA. STAT. ANN. § 97.041 (Supp. 1973); ILL. CONST. art. 3, § 2; IND. STAT. ANN. § 29–4804 (1969 Replacement); KY. CONST. § 145; LA. CONST. art. VIII, § 6; LA. REV. STAT. tit. 18, §§ 42, 270.210 (1969); MICH. CONST. art. II, § 2; MO. CONST. art. 8, § 2; MO. REV. STAT. § 111.021 (Supp. 1973); MO. REV. STAT. § 113.040 (1966); MO. REV. STAT. § 222.010 (1962); N.H. REV. STAT. 607–A (Supp. 1972); N.J. REV. STAT. ANN. § 19:4–1 (Supp. 1972–1973); OKLA. STAT. ANN. tit. 21, § 65 (1968); ORE. REV. STAT. § 137.240 (1969 Replacement); S.D. CODE § 23–48–35 (1967); UTAH CODE ANN. § 76–1–36 (1953).

[221] ALASKA STAT. § 15.05.030 (1971); GA. CONST. § 2–801; ILL. STAT. ANN. ch. 46 § 3–5 (Smith-Hurd Supp. 1972); KAN. STAT. ANN. § 21–4615 (Supp. 1972); LA. CONST. art. VII, § 1; LA. REV. STAT. § 18: 42 (1969); LA. REV. STAT. § 18: 270.210 (Supp. 1972); MO. REV. STAT. § 560.610 (Supp. 1973); N.C. GEN. STAT. § 163–55 (1972); ORE. CONST. art. II, § 3; R.I. GEN. LAWS ANN. § 13–6–2 (1969 Reenactment).

[222] ALA. CONST. § 182; ALA. CODE tit. 17, § 15 (1958); ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. § 16–101 (Supp. 1972–1973); GA. CONST. § 2–801; IDAHO CONST. art. VI, § 3 (Supp. 1972); IDAHO CODE § 34–403 (Supp. 1972); KAN. CONST. art. 5, §

2; KY. CONST. § 145; MINN. CONST. art. 7, § 2; NEB. CONST. art. VI; NEV. CONST. art. II, § 1; N.H. CONST. pt. 1, art. II; N.D. CONST. art. V, § 127; N.D. CENT. CODE § 16-01-04 (1971 Replacement); S.D. CONST. art. VII, § 8; UTAH CONST. art. IV, § 6; W. VA. CONST. art. IV, § 1; W. VA. CODE ANN. § 3-1-13 (1971); WIS. CONST. art. III, § 2; WIS. STAT. ANN. § 6.03 (1967).

[223] COLO. CONST. art. III, § 10; COLO. REV. STAT. ANN. § 49-3-2 (Perm. Cum. Supp. 1971); FLA. STAT. ANN. § 940.05 (1973) (after having served maximum term of sentence or after having been granted final release by parole and probation commission); HAWAII REV. STAT. § 716-5 (Supp. 1971); ILL. ANN. STAT. ch. 38, § 124-2 (Smith-Hurd Supp. 1972) ILL. ANN. STAT. ch. 46, §§ 3-5, 29A-5 (Smith-Hurd Supp. 1972); KAN. STAT. ANN. § 22-3722 (Supp. 1972) (upon discharge from imprisonment or upon issuance of "certificate of discharge" from parole or probation); MINN. STAT. § 609.165 (1964) (on expiration of sentence); MONT. CONST. art. IV, § 2 (felons may vote upon release from confinement); NEB. REV. STAT. § 29-112.01 (1964) (upon satisfaction of judgment when sentence is other than confinement); NEB. REV. STAT. § 29-2264 (Cum. Supp. 1972) (upon satisfactory completion of probation); NEB. REV. STAT. § 83-1118 (1971) (upon satisfactory completion of sentence or parole); N.H. REV. STAT. § 607-A (Supp. 1972) (upon "discharge after completion of service of his sentence or after service under probation or parole"); N.J. REV. STAT. ANN. § 19:4-1 (Supp. 1972-1973) (upon completion of sentence, parole or probation); N.Y. ELECTION LAW § 152 (McKinney Supp. 1972-1973) (upon expiration of maximum sentence or discharge from parole); OHIO REV. CODE ANN. § 2967.16 (Supp. 1972) (upon completion of maximum term of sentence or final release by parole authority) [Legislation to allow suffrage during probation, parole and conditional pardon is in conference committee at press time.]; ORE. REV. STAT. § 137.250 (1969 Replacement) (upon final discharge from probation, parole, or imprisonment); S.D. CODE § 24-5-2 (1967) (upon discharge from penitentiary); S.D. CODE § 23-57-7 (1967) (upon expiration of time of disemeanant's suspended sentence); WASH. REV. CODE ANN. § 9.96.050 (Supp. 1972) (upon order of final discharge which shall not occur within a period of one year from the date of conditional discharge); 51 OP. W. VA. ATT'Y GEN. 182 (1965) (construing W. VA. CONST. IV, § 1 not to prohibit a convicted person from voting after completion of sentence); WIS. STAT. ANN. § 57.078 (Supp. 1972-1973) (by serving out term of imprisonment or otherwise satisfying the judgment against him); WYO. STAT. ANN. § 7-311 (1957) (certificate of discharge restores all rights).

[224] The states in this category restore the right to vote for all disenfranchised offenders after a determinate period of time. Thus, no offender in these states is disenfranchised permanently.

DEL. CODE ANN. tit. 11, § 4347 (Supp. 1970); D.C. CODE ANN. § 1-1102 (Supp. 1973) (five years after discharge from incarceration; three years after discharge if, upon application, the Superior Court of the District of Columbia certifies ex-offender's good conduct to Board of Election); IND. STAT. ANN. § 29-5964 (1969 Replacement) (persons convicted of felonies "shall be disenfranchised for any determinate period"); IND. STAT. ANN. § 29-5964 (1969 Replacement) (misdemeanants "shall be disenfranchised for any determinate period not to exceed five years"); ME. CONST. art. IX (enabling power to disenfranchise for up to 10 years); MASS. GEN. LAWS ch. 55, § 37 (1958) (disenfranchisement for three years following date of conviction); N.C. GEN. STAT. § 13-1 (Supp. 1971)(two years after release by Department of Corrections, if no intervening convictions); PA. CONST. art. VII, § 7 (conviction for election crime disenfranchises for election in question); PA. STAT. ANN. tit. 25, § 3552 (1963) (four years after conviction for election crime); VT. CONST. ch. II, § 51 (conviction for election crime disenfranchises for election in question).

[225] The states included in this category disenfranchise some offenders for determinate periods of time and others permanently. Listed below are the provisions which state the fixed time period for restoration of voting rights.

DEL. CONST. art. V, § 7; DEL. CODE ANN. tit. 15, § 1701 (Supp. 1970) (10 years after conviction and sentence for election crimes); IOWA CODE § 51.16 (1949) (judges and clerks convicted of election offenses are disenfranchised for five years); KY. REV. STAT. §§ 160.991, 432.350 (1971); MO. REV. STAT. § 129.920 (1966) (10 year disenfranchisement for "corrupt registration" of voters).

[226] ALASKA CONST. art. III, § 21; ALASKA STAT. § 33.20.070 (1971); ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. § 31–443 (1956); ARK. CONST. art. 6, § 18; ARK. STAT. ANN. § 12–300(m) (1968); CAL. CONST. art. V, § 8 (no pardon may be granted to anyone twice convicted of a felony except on recommendation of California Supreme Court, four judges concurring); CAL. PENAL CODE §§ 4852.17, 4853 (West 1970); COLO. CONST. art. IV, § 8; DEL. CONST. art. VII, § 1 (upon recommendation of Board of Pardons); FLA. CONST. art. 4, § 8 (1968 Revision) (with approval of three members of cabinet); FLA. STAT. ANN. § 940.01 (Supp. 1973) (with approval of three members of cabinet); HAWAII CONST. art. IV, § 5 (Supp. 1971); IDAHO CODE § 20–240 (Supp. 1972); ILL. STAT. ANN. ch. 108, § 49 (1952); IND. CONST. art. V, § 17; IOWA CONST. art. 4, § 16; IOWA CODE ANN. § 248.12 (1969); KAN. CONST. art. 1, § 7; KAN. STAT. ANN. § 22–3701 (Supp. 1972); KY. CONST. §§ 77, 145; LA. CONST. art. 5, § 10 (upon written recommendation of lieutenant governor, attorney general, or presiding judge of court of conviction; written recommendation requirement waived for first felony offenders); ME. CONST. art. V, § 11 ("with the advice and consent of the Council. . . ."); MD. CONST. art. II, § 20; MD. REV. STAT. ANN. art. 41, § 118 (1971); MD. REV. STAT. ANN. art. 33, 3–4, as amended, ch. 667 Laws of Md. of 1972; MASS. CONST. pt. 2, ch. 2, § 1, art. 7 (with advice of council; general court may prescribe pardon terms in felony cases); MASS. GEN. LAWS ch. 127, § 152 (Supp. 1973) (public hearing required in felony cases); MICH. CONST. art. V, § 14; MINN. CONST. art. V, § 4 (in conjunction with Board of Pardons); MO. CONST. art. 4, § 7; MO. REV. STAT. § 222.030 (1962); MO. REV. STAT. § 560.610 (Supp. 1973); MONT. CONST. art. VII, § 9 (advised by Board of Pardons); NEV. CONST. art. V, § 13; NEV. CONST. art V, § 14 (in conjunction with Attorney General and justices of Supreme Court); N.J. REV. STAT. ANN. § 2A:167–5 (1971); N.M. CONST. art. V, § 6; N.M. STAT. ANN. §§ 40A–29–14, 21 (1964); N.Y. CONST. art. 4, § 4; N.C. CONST. art. III, § 5(6); N.D. CONST. art. III, § 76 (in conjunction with Board of Pardon); OHIO CONST. art. III, § 11; OKLA. CONST. art. 6, § 10 (upon recommendation of majority of Pardon and Parole Board); OKLA. STAT. ANN. tit. 57, §§ 332, 345 (1969); ORE. CONST. art. V, § 14; PA. CONST. art. IV, § 9 (only upon recommendation in writing of majority of Board of Pardons); PA. STAT. ANN. tit. 19, § 893 (1964) (fulfillment of sentence equivalent to pardon); R.I. CONST. amend. 2 (with advice and consent of Senate); S.D. CONST. art. IV, § 5; S.D. CODE § 23–59–1 (1967) ("only upon recommendation in writing of the board of pardons and paroles"); TENN. CONST. art. 3, § 6; TENN. CODE. ANN. § 40–3501 (1955); TEX. CONST. art. 4, § 11 (upon written recommendation of majority of Board of Pardons and Paroles); TEX. CODE CRIM. PROC. art. 48.01 (1966 Revision) (upon written recommendation of majority of Board of Pardons and Paroles); VT. CONST. ch. II, § 20; VA. CONST. art. V, § 12; WASH. CONST. art. 3, §§ 9, 11; WASH. REV. CODE ANN. §§ 9.95.160, 9.96.010 (1963); W. VA. CONST. art. VII, § 11; W. VA. CODE ANN. § 5–1–16 (1971); WIS. CONST. art. 5, § 6; WYO. CONST. art. 4, § 5; WYO. STAT. ANN. § 7–386 (1959).

[227] ALA. CONST. amend. 38; ALA. CODE tit. 42, § 1 (1958) (by State Board of Pardons and Paroles); ARIZ. REV. STAT. ANN. §§ 13–1742 to 1745 (Supp. 1972–1973) (within judicial discretion); CAL. PENAL CODE § 1203.4 (West 1970); CONN. GEN. STAT. ANN. §§ 9–47, 48 (by Commission on Forfeited Rights); D.C. CODE ANN. § 1–220 (Supp. V, 1972) (by Commissioners of the District of Columbia); FLA. STAT. ANN. § 940.05 (Supp. 1973) (by Board of Pardons); GA. CONST. § 2–3011 (by State Board of Pardons and Paroles); GA. CODE ANN. § 27–2701 (1972 Revision) (by State Board of Pardons and Paroles); GA. CODE ANN. § 77–528 (1964 Revision) (describes effect of pardon); IDAHO CONST. art. IV, § 7 (by Board of Paroles); MISS. CONST. art. 12, § 253 (by the legis-

lature); MISS. CODE § 2503.5 (1957) (if honorably discharged from certain military service); MO. REV. STAT. § 216.355 (1962) (by Board of Probation); NEB. CONST. art. IV, § 13 (by Board of Pardons); NEB. REV. STAT. § 29–112 (1964) (by Board of Pardons); NEV. REV. STAT. § 213.155 (1968) (Parole Board may restore citizenship upon expiration of parole); N.H. CONST. pt. I, art. 11 (by Supreme Court); N.D. CENT. CODE §§ 12–55–05, 12–55–24 (1960) (by Board of Pardons); R.I. CONST. amend. 25, § 4 ("[no] person convicted of bribery, or of any crime deemed infamous at common law, [shall] be permitted to exercise [the franchise] until he be expressly restored thereto by act of the general assembly"); S.C. CONST. art. IV, § 11 (by Probation, Parole and Pardon Board); TENN. CODE ANN. § 40–3701 (1955) (by the Circuit Court); UTAH CONST. art. VII, § 12 (by Board of Pardons); UTAH CODE ANN. § 77–62–3 (1953) (duties of Board of Pardons).

FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72–1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL AND ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT EDMUND G. BROWN JR., SECRETARY OF STATE OF CALIFORNIA

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OCTOBER TERM, 1973

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vs.

ABRAN RAMIREZ, LARRY GILL AND ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT EDMUND G. BROWN JR., SECRETARY OF STATE OF CALIFORNIA

QUESTION PRESENTED

Whether an otherwise eligible elector who in the past was convicted of a felony for which he has completely served his term of imprisonment and parole may, consistent with the Fourteenth Amendment, be denied his right to vote on the basis of a determination by a local election official that the crime for which he was convicted was "infamous."

STATEMENT OF THE CASE

Since 1849 the California Constitution has contained a provision denying the right to vote to persons who had been convicted of "infamous crimes." Until 1966, the term "infamous crime" was generally interpreted by election officials and the lower courts in California to include all felonies. In 1966, however, the California Supreme Court in *Otsuka v. Hite*, 64 Cal.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284, ruled that the voting prohibition was applicable only to felonies "involving moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process." 64 Cal.2d at 599.

Following the *Otsuka* decision it became the responsibility of local officials in each of the 58 California counties to determine which former felons would be permitted to vote. The result was that the right to vote of an ex-felon in California was usually determined solely by the county in which he happened to reside. A report prepared by the Secretary of State's office on May 30, 1972, following a survey of the county election offices concluded that "a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others." (Record, Exhibit I to Petition for Writ of Mandate, at 2.)

Shortly after the issuance of the Secretary of State's report, three former felons who had been denied the right to vote and four organizations petitioned for a writ of mandate from the California Supreme Court,

seeking a ruling that the ex-felon voting disqualification as applied to persons who had completely served their terms of imprisonment and parole was a denial of equal protection of the laws. Named as respondents were Secretary of State Edmund G. Brown Jr., the chief elections officer of California, and the clerks of the three counties in which the individual petitioners resided, as representatives of the class of county election officials. The Secretary of State, represented by the California Attorney General, urged the State Supreme Court to exercise its original jurisdiction and issue an alternative writ of mandate (analogous, in California procedure, to an order to show cause) so that the confusion resulting from *Otsuka* could be resolved and voter eligibility made uniform throughout the State. The alternative writ was issued, and the three named county clerks advised the court that rather than contest the issue they would register all ex-felons who were otherwise eligible. On the other hand, the clerk of Mendocino County intervened as a party respondent and urged the court to deny the petition.

On March 30, 1973, the California Supreme Court unanimously issued its ruling that the ex-felon disqualification was unconstitutional. *Ramirez v. Brown.*, 9 Cal.3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137. On May 26, 1973, the clerk of Mendocino County filed a Petition for Writ of Certiorari in this Court. She was not joined in seeking review of the California Supreme Court decision by any of the four original

respondents in the proceeding below. This Court granted Certiorari on October 9, 1973.

The California Secretary of State was not mentioned in the caption in the Petition for Writ of Certiorari, but since he was a party to the proceeding below he is automatically a party respondent in the present proceeding by operation of Rule 21 of the Rules of this Court. On July 24, 1973, the Secretary of State notified the Court of his intention to participate in this proceeding as a party respondent.

SUMMARY OF ARGUMENT

1. Prior to the decision of the court below, there was a complete lack of uniformity between California counties with regard to disenfranchisement of ex-felons. Virtually any former felon would be permitted to vote in some California counties and barred from voting in others. In practice, the ex-felon voter disqualification was a geographic discrimination without semblance of rhyme or reason. The California disenfranchisement of former felons, as interpreted by the California Supreme Court and as administered by county election officials was utterly indefensible, without regard to whether a uniform disenfranchisement of former felons would be constitutionally permissible.

2. Section 2 of the Fourteenth Amendment does not create an exception to the Equal Protection Clause. It does not purport to do so by its own terms. Section 2 cannot be read as creating an implied exception permitting the states to disenfranchise former felons in violation of the Equal Protection Clause un-

less it is also read as authorizing the state to disenfranchise on the basis of race. Such an interpretation would be absurd in light of numerous decisions of this Court. Although Section 2 does suggest that the authors of the Fourteenth Amendment did not object to disenfranchising former felons, changing notions of equal protection as well as changes in the manner of conducting elections have made the disenfranchisement impermissible, particularly when administered discriminatorily, as in California.

ARGUMENT

1. The county-by-county disenfranchisement of ex-felons is unconstitutional because a person's voting qualifications are unrelated to the county in which he resides.

On its face, the ex-felon voter disqualification in the California Constitution appears to set forth a single rule governing the entire state. Cal. Const. art. 2, § 3. It is well-established, however, that:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.
>
> *Yick Wo v. Hopkins,* 118 U.S. 356, 373–74 (1886).

Although California county election officials do not disqualify voters with an "evil eye," the practical effects of the disenfranchisement of ex-felons has

proved to be as arbitrary and unfair as the practices which were condemned in *Yick Wo v. Hopkins, supra.*

In *Otsuka v. Hite,* 64 Cal. 2d 596, 414 P. 2d 412, 51 Cal. Rptr. 284 (1966), the California Supreme Court ruled that not all ex-felons are disenfranchised in California, but only those whose crimes involved moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process.

64 Cal. 2d at 599.

The California court ruled that a conviction for refusing to report for induction under the Selective Service and Training Act of 1940 did not constitute an "infamous crime" causing disenfranchisement. Otherwise, the court left it up to the county clerks and registrars of voters to determine which felonies were "infamous" under the new standard.

The result of the *Otsuka* decision was a complete lack of uniformity in application of the ex-felon disqualification from one county to another. The Secretary of State reported in 1972, following a survey of the counties, that "a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others." *Report of Secretary of State Regarding the Right to Vote of Ex-Felons in California,* May 30, 1972, at 2 (Record, Exhibit I to Petition for Writ of Mandate). The report also indicated that "in those counties where records were kept which made estimates possible, the figures ranged from 100% of those

who applied having been permitted to vote, to 100% of those who applied having been denied the vote." *Id.* at 4. As specific examples of inequities arising from lack of a uniform statewide practice, the report cited the following:

a. The crime of murder disqualifies a person from voting in at least four counties, but does not disqualify in at least six counties. In one additional county, first degree murder disqualifies, but not second degree murder.
b. Sale of drugs disqualifies an applicant in at least five counties, but not in at least nine counties.
c. Persons convicted of robbery have been permitted to vote in at least eight counties, but not in at least seven counties.
d. A person convicted of a felony under the Election Code would probably be denied the right to vote in every county.
e. A person convicted of refusal of induction into the armed forces would apparently be permitted the right to vote in each county.
f. As to every other felony, however, it appears that some counties might deny the right to vote while other counties would grant it.

Id. at 5

The California Supreme Court was manifestly correct in striking down a voter disqualification which has been imposed so arbitrarily and so inconsistently. The state has no rational basis for disenfranchising an auto thief in Los Angeles while it permits a murderer to vote in San Francisco. No conceivable state

interest, compelling or otherwise, is furthered by granting the right to vote to a rapist in Santa Clara County but then taking it away if he happens to move across the county line into San Mateo. See Appendix, pp. 33–40. Even if a uniform disenfranchisement of some or all felons could be upheld, the California provision, as authoritatively construed in *Otsuka,* has been so discriminatorily implemented as to be utterly indefensible.

Far from furthering any legitimate state interest, the post-*Otsuka* ex-felon disqualification has added to the administrative burden of election officials and interfered with the accomplishment of objectives which have been explicitly enunciated by the Legislature. Calif. Elections Code § 201 provides in part:

> It is ... the intent of the Legislature that county clerks, in order to promote and encourage voter registrations, shall enlist the support and cooperation of interested citizens and organizations, and shall deputize as registrars qualified citizens in such a way as to cover most effectively every section of the county. The persons so deputized shall be permitted to register voters anywhere within the county, and the county clerk shall not deny deputy registrars the right to register voters anywhere in the county.

Pursuant to this section, most major voter registration drives in California are conducted by private citizens who volunteer to serve without pay or with nominal pay on a part-time basis. Such volunteers were unable to implement complex guidelines adopted

under *Otsuka*. Accordingly, deputy registrars were usually instructed to refuse to register *any* ex-felons, but to refer them to the county clerk or county counsel. Such a practice not only created extra work for the county officials who had to decide such cases, but it also hindered the legislative policy declared in Section 201 of promoting and encouraging voter registrations by permitting deputy registrars to register voters anywhere in the county.

It is apparent from the foregoing that the Court below correctly determined that California was violating the Equal Protection Clause in its disenfranchisement of ex-felons. If this Court were to reverse the decision of the California Supreme Court, election officials would be forced to return to the same state of confusion as before, for *Otsuka* would be restored as the authoritative construction of the disenfranchisement provision by the state's highest tribunal. Accordingly, even if this Court believes that a consistent and uniform disenfranchisement of former felons may be constitutionally permissible, the decision of the California Supreme Court in the present case should be affirmed.

2. Section 2 of the Fourteenth Amendment does not, by its Own Terms or Under the Decisions of This Court, Justify Denial of Equal Protection of the Laws in the Present Case.

Notwithstanding the manifest inequity of the California ex-felon disqualification as it is applied, and its utter unrelatedness to any state interest, the Men-

docino county clerk asserts that the decision of the California Supreme Court should be overruled because Section 2 of the Fourteenth Amendment specifically authorizes the disqualification. This assertion, which was not advanced in the court below, has been accepted by some courts in recent years, *e.g., Green v. Bd. of Elections of New York City,* 380 F. 2d 445, 452 (2d Cir. 1967); *Beacham v. Braterman,* 300 F. Supp. 182 (S.D. Fla. 1969), aff'd mem., 396 U.S. 12 (1969), but it has no support in the language of the Fourteenth Amendment and it is in fact inconsistent with numerous decisions of this Court.

Section 2 of the Fourteenth Amendment,[1] does not, by its terms, permit a State to do anything prohibited by Section 1. Section 2 is not set forth as an exception to Section 1, nor does it even make any reference to Section 1. Indeed, Section 2 does not purport to either permit or prohibit any action by a State, but merely provides for apportionment of Representatives among the States. It is asserted, however, that Section 2 impliedly creates an exception to Section 1, because the

[1] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for particiaption in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

framers of the Fourteenth Amendment would not have set up an apportionment formula in Section 2 based on a voter disqualification that was prohibited by Section 1.

Unfortunately for the Mendocino County Clerk, her argument is too broad. It is true that Section 2 contemplates that states may disqualify ex-felons from voting. But Section 2 also contemplates that states would disqualify citizens from voting on other grounds, including race. If disenfranchisement of Negroes had not been contemplated, there would have been no reason for enacting Section 2. Accordingly, if Section 2 is read as creating an implied exception to Section 1, then the Equal Protection Clause would not prohibit a state from setting up race as a voter qualification. Such a conclusion is, of course, contrary to numerous decisions of this Court. *E.g., Nixon v. Herndon,* 273 U.S. 536 (1927). The foregoing analysis was adopted by a three-judge district court in *Stephens v. Yeomans,* 327 F. Supp. 1182 (D.N.J. 1970).

It is true that under Section 2 a state which disenfranchised on the basis of race would be penalized by losing representation in Congress whereas a state which disenfranchises on the basis of a criminal conviction is exempted from such a penalty. The fact remains, however, that both types of disenfranchisement are contemplated by Section 2, and there is no more basis for reading Section 2 as creating an exception to Section 1 in one case than there is in the

other. The most one can conclude is that the drafters of the Fourteenth Amendment found both types of disenfranchisement tolerable but found racial disenfranchisement somewhat more objectionable than disenfranchisement for a criminal conviction. Since it is clear that Section 2 does not create an exception to Section 1, the fact that it may evidence that in the mid-Nineteenth Century disenfranchisement of ex-felons was a generally accepted practice is not conclusive for present-day interpretation of the Equal Protection Clause:

> the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.
>
> *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 669 (1966).

Aside from changes in judicial notions of "equal treatment" under the Equal Protection Clause, changes in the conduct of elections have removed many of the considerations which may have justified the disenfranchisement of ex-felons. The court below described many of the factors—development of the secret ballot; registration of voters; penal statutes prohibiting buying and selling of votes and other types of election fraud; vastly increased constitu-

encies, making it prohibitively expensive and logistically impossible to buy enough votes to affect an election—which have done away with the necessity to rely on crude measures such as the blanket disenfranchisement of all former felons. *Ramirez v. Brown,* 9 Cal. 3d 199, 212–216, 507 P. 2d 1345, 107 Cal. Rptr. 137 (1973). Even if the ex-felon disqualification was a valid legislative responsive to conditions of the Nineteenth Century, the changes that have occurred over the last century have removed all rational basis for the disqualification. Accordingly, the court below appropriately declared the disqualification provision invalid. *Cf. Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924).

CONCLUSION

For the reasons set forth above, the considerations surrounding the disenfranchisement provision in question are unique to California, and respondent Brown respectfully submits that the writ of certiorari should be dismissed as improvidently granted. In the alternative, respondent Brown respectfully submits that the judgment and opinion of the California Supreme Court below should be affirmed.

Respectfully submitted,

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Edmund G. Brown Jr.
Secretary of State of the
State of California

Dated, December, 1973

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 72-1589

Supreme Court, U. S.
FILED
JAN 9 1974
MICHAEL RODAK, JR., CLERK

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,
Petitioner,

vs.

ADRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S REPLY BRIEF

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In the Supreme Court
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No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,
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ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of California

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PETITIONER'S REPLY BRIEF

I. THE SPECIAL PROVISIONS OF SECTION TWO OF THE FOURTEENTH AMENDMENT PREVAIL OVER THE GENERAL PROVISIONS OF SECTION ONE OF THAT SAME AMENDMENT, EVEN THOUGH SEPARATELY DRAFTED.

Both the California Supreme Court and the United States Supreme Court have long recognized the basic fundamental concepts of statutory and constitutional construction which both courts so frequently use to direct themselves toward a proper conclusion. As was stated by the California Supreme Court:

> "* * * special provisions control more general provisions, and the general and special provisions operate together, neither working to repeal the other. (*Martin v. Election Comrs.*, 126 Cal. 404 [58 P. 932]; 11 Cal.Jur.2d 352-353; 11 Am.Jur. 663.)"
>
> *People v. Western Air Lines, Inc.*, 42 C.2d 621, 637 (1954).

The position taken by respondents herein appears similar to that taken by the appellant in *Martin v. Election Comrs., supra.* The California Supreme Court in *Martin* stated:

> "The rule of construction invoked by appellants seems to be that a provision in a law or constitution in reference to a particular matter is inoperative and void if it be inconsistent with the general provisions of said law or constitution. The direct opposite is the true construction in such cases.
>
> " 'The more specific provision controls the general, without regard to their comparative dates; the

two acts operating together, and neither working the repeal of the other.' [Citations.]"

Martin v. Election Comrs., supra, 126 C. 404, 411 (1899).[1]

The petitioner submits that the same rules of construction have been followed by the United States Supreme Court in cases dealing with statutory interpretation. As this Court has previously stated:

"* * * We are not at liberty to deny effect to specific provisions, which congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character even if found in the same statute."

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 81 L.Ed. 893, 907 (1936).

In following that position, this Court in a subsequent opinion further stated:

"* * * the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute. * * *" [Citations.]' "

Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 229-230, 1 L.Ed.2d 786, 790-791 (1957).

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[1]It will be noted that both sections of the Fourteenth Amendment were enacted on the same date, July 28, 1868.

A general provision of a statute or constitution affects those cases within its general language. However, a special provision must prevail regarding its subject matter since it constitutes a limitation of the general grant.[2]

It must therefore be concluded that the special provisions of Section Two of the Fourteenth Amendment allowing for the denial of the right to vote limits the scope of the general provision of Section One of the Fourteenth Amendment, the equal protection clause.[3]

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[2]See authorities collected in 16 Am.Jur.2d, Constitutional Law, Section 69, page 247; and 50 Am.Jur., Statutes, Section 367, page 371.

[3]In *United States v. Reese*, 92 U.S. 214, 28 L. Ed. 563, the court in a Note on page 563 and 564, stated:

"Women are not entitled to vote by virtue of the Fourteenth Amendment to the Constitution of the United States. *Van Valkenburgh v. Brown*, 43 Cal., 43; • • •

The elective franchise is not a natural right, but rests upon the authority of law defining the qualifications of those who may exercise it. The Federal Constitution makes women citizens and capable of becoming voters; yet that provision does not execute itself, but requires legislative action to authorize them to vote; and where the Legislature has only enacted that male citizens may vote, women have no right to vote. • • •

The Fifteenth Amendment takes away the authority of the States to discriminate, so far as the right to vote is concerned, against citizens of the United States on account of either race, color or previous condition of servitude, and colored persons equally with whites are citizens of the United States. • • •

But the power of the States upon all other grounds, including that of sex remains intact. • • •

It does not, however, confer the right of suffrage on anyone. • • •

It does not invest citizens of the United States with a new right within the protecting power of Congress. • • •

It does not include persons who have merely declared their intentions to become citizens. • • •

The Fifteenth Amendment leaves to the States, as before, the regulation of suffrage and of the qualification of electors within their limits, with the single restriction that they shall not make color or race or previous condition of servitude, a reason of discrimination. • • • (Citations omitted.)"

II. STATISTICS PROVE THAT OVER SIXTY PER CENT OF THE APPLICATIONS FOR REHABILITATION PARDONS ARE GRANTED.

Respondents attempt to convince the Court that, because only 0.82 per cent of the persons released from state prison from 1968 through 1971 were granted rehabilitation pardons,[4] the administrative-judicial procedure set forth in the California Penal Code is unconstitutional.

Petitioner agrees that, from 1968 through 1971, 34,262 persons were released from state prison and that only 282 rehabilitation pardons were granted. But the number of pardons granted must be taken

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In the Court's opinion in *United States v. Reese*, supra, page 564, the Court stated:

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment, there was no constitutional guaranty against this discrimination; now there is."

Also see the discussion in dissenting opinion of Mr. Justice Hunt, id., page 575, on the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments.

(See *James v. Bowman*, 190 U.S. 124; *United States v. Cruikshank*, 92 U.S. 542; *United States v. Anthony*, 24 Fed. Case No. 14,459, p. 829 (C.C. N.D. N.Y. 1873); *Stone v. Smith*, 34 N.E. 521.)

It is submitted, that had the Fourteenth Amendment in section one intended that all persons were entitled to the right to vote, there should have been no reason for the passage of the Fifteenth, Nineteenth or Twenty-sixth Amendments. (See *Van Valkenburg v. Brown*, 43 Cal. 43, 52-53.)

[4]See Brief for Respondents at pages 26-27.

in the same context as the number of applications. What respondent failed to advise the Court is that there were only 450 applications for such pardons.[5] This means that actually 62.66 per cent of those who applied for a rehabilitation pardon received such a pardon.

III. SECTION 350 OF THE CALIFORNIA ELECTIONS CODE PROVIDES ADEQUATE RELIEF WHERE THE COUNTY CLERK FAILS TO FOLLOW THE CONCLUSIONS REACHED IN OTSUKA v. HITE, 64 C.2d 596 (1966).

California Elections Code, Section 350, provides for a judicial proceeding to review a refusal to register an ex-felon because the crime in question is infamous.

The argument set forth in the amicus curiae brief of the American Civil Liberties Union of Southern California speaks of due process requiring an administrative hearing (see Brief, pages 11-14) and that judicial review under Section 350 of the California Elections Code is no substitute therefor. But the authorities cited in support thereof apply to cases where the governmental agency withdraws a "previously conferred benefit," interest, or right. (See, *e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970).) This is not the situation presently at bench.

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[5]We have been advised by the State of California Department of Justice, Bureau of Identification, that in 1968 there were 106 applications for rehabilitation pardons; 1969 had 96 applications; 1970 had 135 applications; and 1971 had 113 applications. When an application for rehabilitation is filed, the Department of Justice is notified. (See Sections 4852.14 and 4852.17, California Penal Code.)

The current case focuses upon persons whose terms of incarceration and parole have expired and who now seek the restoration of the franchise. The withdrawal of a "previously conferred benefit" by a governmental body is not involved, as the franchise had been lost at the time of pronouncement of judgment and the rendering of sentence by the trial court.

Petitioner contends it is not essential that a prior administrative hearing take place. Section 350 of the California Elections Code provides for a judicial tribunal before which an objection to the county clerk's decision may be raised and considered. An administrative determination from which recourse may be had to the courts is not violative of due process. (See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Anderson National Bank v. Luckett*, 321 U.S. 233, 246-247 (1944).)

IV. FINCHER v. SCOTT, 352 F.Supp. 117 (M.D. N.C. 1972), AFF'D, 411 U.S. 961 (1973), CLEARLY APPLIES TO PERSONS CONVICTED OF INFAMOUS CRIMES THAT ARE NOT INCARCERATED.

Respondents in their brief (see page 38, footnote 36) and the American Bar Association in its amicus curiae brief (see page 21) assert that *Fincher* dealt only with the right to vote of a person that is incarcerated for the commission of a felony and therefore is inapplicable to the case at bench. Said conclusion is in error.

A stipulation filed in the United States District Court for the Middle District of North Carolina and signed by Norman B. Smith, counsel for *Fincher,* and Henry E. Poole, counsel for *Scott,* page 2, paragraph number 5, states as follows:

> "5. In September, 1966, plaintiff was convicted of forgery of a check, and he received a sentence of four to six years imprisonment in the Superior Court of Anson County, North Carolina. Plaintiff completed the service of this sentence on March 27, 1970. Plaintiff did not petition for, and has not had, his citizenship restored."

Although *Fincher* was also in jail serving a misdemeanor sentence for nonconnected crimes,[6] the Board of Elections specified in its letter denying registration that one of the bases for the denial was N.C. G.S. 163-55(3). (See Exhibit A to the hereinabove referred to stipulation.)[7]

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[6]See page 2, paragraph 6, of the hereinbefore referred to stipulation which reads as follows:

> "At the present time plaintiff is serving misdemeanor sentences for escape, temporary automobile larceny, driving under the influence of intoxicating liquor, driving without valid operator's permit, and issuing worthless check. • • •"

[7]"Mr. Fred William Fincher, P. O. Box 268, Wagram, North Carolina 28396

"Dear Mr. Fincher:

"This is to notify you that your application for voter registration has been denied by the Scotland County Board of Elections. The decision was based upon the following Election Laws of the North Carolina General Statutes:

> "G. S. 163-55 (3.) Persons who have been convicted, or who have confessed their guilt in open court, upon indictment, of any crime the punishment for which is now or may hereafter be imprisonment in the State's Prison, unless he shall have had his rights of citizenship restored in the manner prescribed by law. • • •"

It is therefore very clear that the denial of the right to vote to *Fincher* was based upon his 1966 conviction for forgery, wherein he received four to six years in state prison, and that his rights of citizenship had not properly been restored.

Respectfully submitted,

DUNCAN M. JAMES,
District Attorney of the County of Mendocino,
Counsel for Petitioner.

JONATHAN M. LEHAN,
Deputy District Attorney,
Of Counsel.

Dated: January 8, 1974.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RICHARDSON, COUNTY CLERK AND REGISTRAR OF VOTERS OF MENDOCINO COUNTY *v.* RAMIREZ ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 72–1589. Argued January 15, 1974—Decided June 24, 1974

After the three individual respondents, who had been convicted of felonies and had completed their sentences and paroles, were refused registration to vote in three different California counties respectively because of their felony convictions, they brought a class petition, on behalf of themselves and all other ex-felons similarly situated, for a writ of mandate in the California Supreme Court, naming as defendants the Secretary of State and the three county election officials who had denied them registration "individually and as representatives of the class of all other" county election officials in the State, and challenging the constitutionality of respondents' disenfranchisement on the ground, *inter alia*, that provisions of the California Constitution and the implementing statutes that disenfranchised ex-felons denied them equal protection. The three county officials named as defendants decided not to contest the action and told the court they would henceforth register to vote ex-felons, including respondents, whose sentences and paroles had expired. Prior to the return date of the writ, the court added to the named defendants (instead of allowing her to intervene) another county election official (petitioner here) who was the defendant in a similar action by an ex-felon pending in the State Court of Appeal. After holding that the three first named county officials' acquiescence did not render the case moot, the California Supreme Court went on to hold that the constitutional and statutory provisions in question, as applied to ex-felons whose sentences and paroles had expired, violated the Equal Protection Clause of the Fourteenth Amendment, but did not issue the peremptory writ. *Held:*

Syllabus

1. In view of its unusual procedural history in the Supreme Court of California, the case is not moot. Pp. 8–15.

(a) The State Supreme Court's action in adding petitioner as a named defendant after the other named county officials decided not to contest the action, and at a time when the Secretary of State (who did not join in the petition to this Court) was still a party defendant who had answered the complaint, indicates that the court considered the suit to be not only on behalf of the three named plaintiffs, but also on behalf of all ex-felons in California similarly situated, and also that the court regarded petitioner's opponent in the Court of Appeal suit, both as an unnamed member of the class of ex-felons referred to in the complaint and as one of a class actually seeking to register in petitioner's county, as a party to the Supreme Court action. Pp. 12–14.

(b) Being rendered in a class action in which relief in the nature of declaratory relief was granted, the decision below is not only binding on petitioner and thus dispositive of her other suit, but also decides the federal constitutional question presented for the unnamed members of the classes represented below by petitioner and respondents, whose continuing controversy in the State Supreme Court still continues in this Court. *Brockington* v. *Rhodes*, 396 U. S. 41, distinguished. Pp. 14–15.

2. California, in disenfranchising convicted felons who have completed their sentences and paroles, does not violate the equal Protection Clause. Pp. 16–30.

(a) The understanding of the Framers of the Fourteenth Amendment, as reflected in the express language of § 2 of the Amendment, which exempts from the sanction of reduced congressional representation resulting from the denial of citizens' right to vote, the denial of such right for "participation in rebellion, or other crime," and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise that this Court has held invalid under the Equal Protection Clause. P. 29.

(b) Section 1 of the Fourteenth Amendment, which contains the Equal Protection Clause, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement that was expressly exempted from the less drastic sanction of reduced representation that § 2 imposed for other forms of disenfranchisement. P. 29.

Syllabus

(c) Even if § 2 was made part of the Amendment "largely through the accident of political exigency rather than for the relation which it bore to the other sections of Amendment," as respondents contend, this does not preclude looking to it for guidance in interpreting § 1, since § 2 is as much a part of the Amendment as any of the other sections, and how it became part of the Amendment is less important than what it says and what it means. P. 29.

9 Cal. 3d 199, 507 P. 2d 1345, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined and in Part I–A of which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-1589

Viola N. Richardson, as County Clerk, Etc., Petitioner, v. Abran Ramirez et al. | On Writ of Certiorari to the Supreme Court of California.

[June 24, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The three individual respondents in this case were convicted of felonies and have completed the service of their respective sentences and paroles. They filed a petition for a writ of mandate in the Supreme Court of California to compel California county election officials to register them as voters.[1] They claimed, on behalf of themselves and others similarly situated, that application to them of the provisions of the California Constitution and implementing statutes which disenfranchised persons convicted of an "infamous crime" denied them the right to equal protection of the laws under the Federal Constitution. The Supreme Court of California held that "as applied to all ex-felons whose terms of incarcer-

[1] The petition for a writ of mandate in the Supreme Court of California also named the California Secretary of State as a respondent in his capacity of chief elections officer of the State of California. He did not join the petition for a writ of certiorari to this Court, and has filed a brief as a party respondent. Respondents here (petitioners below) also include, in addition to the three individual respondents, the League of Women Voters and three nonprofit organizations which support the interests of exconvicts—Los Pintos, 7th Step Foundations, Inc. (California Affiliates), and Prisoners' Union.

ation and parole have expired, the provisions of Article II and Article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification . . . , violate the equal protection clause of the Fourteenth Amendment." 9 Cal. 3d 199. We granted certiorari, — U. S. —.

Article XX, section 11, of the California Constitution has provided since its adoption in 1879 that "laws shall be made" to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, "or other high crimes." At the time respondents were refused registration, former Art. II, § 1 of the California Constitution provided in part that "no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall never exercise the privileges of an elector in this state." [2] Sections 310 and 321 of the California Elections Code provide that an affidavit of registration shall show whether the affiant has been convicted of "a

[2] Proposition 7, passed at the November 7, 1972, general election, repealed former Art. II, § 1, of the California Constitution and added new Art. II, § 3:

"The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally retarded person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privilege of an elector in this state."

The Supreme Court of California concluded that the new constitutional provision was no different in substance from the former one, and that it did not implicitly repeal the implementing sections of the California Elections Code challenged here.

felony which disqualifies him from voting."[3] Sections 383, 389, and 390 direct the county clerk to cancel the registration of all voters who have been convicted of "any infamous crime or of the embezzlement or misappropriation of any public money."[4] Sections 14240 and 14246 permit a voter's qualifications to be challenged on the ground that he has been convicted of "a felony" or of "the embezzlement or misappropriation of public

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[3] Section 310 of the California Elections Code provides in relevant part that "the affidavit of registration shall show: . . . (h) That affiant is not disqualified to vote by reason of a felony conviction." Section 321 sets the form of the registration affidavit, which includes the following: "10. I am not disqualified to vote by reason of a felony conviction."

[4] Section 383 of the California Elections Code provides:

"The county clerk shall cancel the registration in the following cases: . . . Upon the production of a certified copy of a subsisting judgment of the conviction of the person registered of any infamous crime or of the embezzlement or misappropriation of any public money. . . ."

Section 389 provides:

"The county clerk shall, in the first week of September in each year, examine the records of the courts having jurisdiction in case of infamous crimes and the embezzlement or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have been finally convicted of an infamous crime or of the embezzlement or misappropriation of public money. . . ."

Section 390 provides:

"The county clerk, on the basis of the records of courts in the county having jurisdiction of such offenses, shall furnish to the registrar of voters in a county where there is a registrar of voters, before the first day of September of each year, a statement showing the names of all persons convicted of infamous crimes or of the embezzlement or misappropriation of public money during the year prior to that first day of September, whose convictions have become final. The registrar of voters shall, during the first week of September in each year, cancel the affidavits of registration of such persons. The county clerk shall certify the statement under the seal of his office. . . ."

money."[5] California provides by statute for restoration of the right to vote to persons convicted of crime either by court order after the completion of probation,[6] or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings.[7] California

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[5] Section 14240 of the California Elections Code provides:

"A person offering to vote may be orally challenged within the polling place only by a member of the precinct board upon any or all of the following grounds: . . . That he has been convicted of a felony. . . . On the day of the election no person, other than a member of a precinct board or other official responsible for the conduct of the election, shall challenge any voter or question him concerning his qualifications to vote. . . ."

Section 14246 provides:

"If the challenge is on the ground that the person challenged has been convicted of a felony or that he has been convicted of the embezzlement or misappropriation of public money, he shall not be questioned, but the fact may be proved by the production of an authenticated copy of the record or by the sworn oral testimony of two witnesses. . . ."

[6] Section 1203.4 of the California Penal Code provides:

"(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. . . ."

[7] Section 4852.01 of the California Penal Code provides that a person convicted of a felony who was incarcerated may file, any time

also provides a procedure by which a person refused registration may obtain judicial review of his disqualification.[8]

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after his release from custody, a notice of intention to apply for a certificate of rehabilitation and pardon. It further provides, however:

"This chapter shall not apply to persons convicted of misdemeanors; to persons who have served time in county jails only; to persons serving a mandatory life parole; to persons committed under death sentences; or to persons in the military service."

Section 4852.13 of the California Penal Code provides:

"If, after hearing, the court finds that the petitioner has demonstrated by his course of conduct his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship, the court shall make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. Such order shall be filed with the clerk of the court, and shall be known as a certificate of rehabilitation. The certificate shall show the date on which the original notice of intention to apply for a certificate was filed."

Section 4852.16 provides:

"The certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to Section 1 of Article VII of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court."

Section 4852.17 provides:

". . . Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) the right to vote. . . ."

[8] Section 350 of the California Elections Code provides:

"If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to

Each of the individual respondents was convicted of one or more felonies, and served some time in jail or prison followed by a successfully terminated parole. Respondent Ramirez was convicted in Texas; respondents Lee and Gill were convicted in California. When Ramirez applied to register to vote in San Luis Obispo County, the County Clerk refused to allow him to register. The Monterey County Clerk refused registration to respondent Lee, and the Stanislaus County Registrar of Voters refused registration to respondent Gill. All three respondents were refused registration because of their felony convictions.[9]

In May 1972 respondents filed a petition for a writ of mandate in the Supreme Court of California, invoking

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compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action."

Respondents contended that pardon was not an effective device for obtaining the franchise, noting that during 1968–1971, 34,262 persons were released from state prisons and while only 282 pardons were granted.

[9] Respondent Ramirez was convicted in Texas of the felony of "robbery by assault" in 1952. He served three months in jail and successfully terminated his parole in 1962. In February 1972 the San Luis Obispo County Clerk refused to allow Ramirez to register to vote on the ground that he had been convicted of a felony and spent time in incarceration. Respondent Lee was convicted of the felony of heroin possession in California in 1955, served two years in prison, and successfully terminated his parole in 1959. In March 1972 the Monterey County Clerk refused to allow Lee to register to vote on the sole ground that he had been convicted of a felony and had not been pardoned by the Governor. Respondent Gill was convicted in 1952 and 1967 of second degree burglary in California, and in 1957 of forgery. He served some time in prison on each conviction, followed by a successful parole. In April 1972 the Stanislaus County Registrar of voters refused to allow Gill to register to vote on the sole ground of his prior felony convictions.

its original jurisdiction.[10] They named as defendants[11] below the three election officials of San Luis Obispo, Monterey, and Stanislaus Counties who had refused to allow them to register, "individually and as representatives of the class of all other County Clerks and Registrars of Voters who have the duty of determining for their respective counties whether any ex-felon will be denied the right to vote." The petition for a writ of mandate challenged the constitutionality of respondents' exclusion from the voting rolls on two grounds. First it was contended that California's denial of the franchise to the class of ex-felons could no longer withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Relying on the Court's recent voting rights cases, respondents argued that a compelling state interest must be found to justify exclusion of a class from the franchise, and that California could assert no such interest with respect to ex-felons. Second, respondents contended that application of the challenged California constitutional and statutory provisions by election officials of the State's 58 counties was so lacking in

[10] Paragraph VI of respondents petition for mandamus states that the named "Petitioners bring this action individually and on behalf of all other persons who are ineligible to register to vote in California solely by reason of a conviction of a felony other than an election code felony." The remainder of the petition makes it clear that the class was further restricted to ex-felons, and the Supreme Court of California so treated it.

[11] We refer to the named "defendants" in the action in the Supreme Court of California, even though in that court they were actually denominated respondents according to California practice, and we refer to named "plaintiffs" in that court, even though they were actually there denominated as plaintiffs. We do this for convenience of reference, in order to avoid as much as possible confusion between reference to the position of the parties in the Supreme Court of California and their position here.

uniformity as to itself deny them due process and "geographical equal protection." They appended a Report by respondent California Secretary of State, and the questionnaires returned by county election officials on which it was based. The Report concluded that there was wide variation in the county election officials' interpretation of the challenged voting exclusions.[12] The Supreme Court of California upheld the first contention and therefore did not reach the second one.

I

Before reaching respondents' constitutional challenge, the Supreme Court of California considered whether the three county clerks' decision not to contest the action, together with their representation to the court that they would henceforth permit all ex-felons whose terms of incarceration and parole had expired to register and vote, rendered this case moot. That court decided that it did not. The acquiesence of the three officials was in no way

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[12] The parties agree that the lack of uniformity is the result of differing interpretations of the 1966 Supreme Court of California decision in *Otsuka* v. *Hite*, 64 Cal. 2d 596, 414 Pac. 2d 412, 51 Cal. Rptr. 284 (1966), which defined "infamous crime" as used in the California constitutional provisions.

The California Secretary of State's Report noted that "[m]ost" of the 49 responding counties "have attempted to develop consistent criteria for determining which ex-felons shall be entitled to register. In some counties these policies have been formalized in writing, but in most instances a case-by-case method has been used." The Report concluded:

"Although the policy within most counties may be consistent, the fact that some counties have adopted different policies has created a situation in which there is a lack of uniformity across the state. It appears from the survey that a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others.

"In order to remedy this lack of uniformity, authoritative guidelines from either the legislature or the courts are urgently needed."

binding on election officials of the other 55 California counties in which respondents might choose to reside, and it was undisputed that there were many ex-felons among the residents of those counties who had been or would be refused registration on the ground challenged. Because the case posed a question of broad public interest, which was likely to recur and which should receive a statewide resolution, the court exercised its "inherent discretion to resolve the issue 'even though an event occurring during its pendency would normally render the matter moot. . . .' This rule is particularly applicable to challenges to the validity of election laws." In addition to California cases, the court cited *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Goosby* v. *Osser*, 409 U. S. 512 (1973).

As a practical matter, there can be no doubt that there is a spirited dispute between the parties in this Court as to the constitutionality of the California provisions disenfranchising ex-felons. Even though the Supreme Court of California did not in fact issue a permanent writ of mandate, and therefore its judgment is in effect to a declaratory judgment, an action for such relief may stem from a controversy that is "definite and concrete, touching upon the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 277, 240–241 (1937). By reason of the special relationship of the public officials in a State to the court of last resort of that State, the decision of the Supreme Court of California if left standing leaves them permanently bound by its conclusion on a matter of federal constitutional law. Cf. *North Dakota Pharmacy Board* v. *Liggett*, — U. S. —.

This case in some respects presents stronger arguments for concluding that a live case in controversy remains than in other election cases in which we have addressed the question of mootness. Unlike *Moore* v. *Ogilvie*, 394

U. S. 814, in which the particular candidacy was not apt to be revived in a future election, or *Hall* v. *Beals*, 396 U. S. 45, in which the voters who had been disenfranchised because of a residency requirement would not have suffered the same fate under the amended statute, respondents here are indefinitely disenfranchised by the provisions of California law which they challenge. While the situation in *Moore* v. *Ogilvie*, *supra*, was described as "capable of repetition, yet evading review," 394 U. S., at 816, that involved here can best be described, in view of the Supreme Court of California's decision against the state officials and their obligation to follow the law as laid down by that court, as "incapable of repetition," and therefore evading review. There are thus the strongest sort of practical arguments, as well as the language of *Moore* v. *Ogilvie*, *supra*, which militate against a conclusion of mootness in this case.

But purely practical considerations have never been thought to be controlling by themselves on the issue of mootness in this Court. While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case and controversy requirement of Art. III to adjudication of actual disputes between adverse parties.

The mootness problem here arises because, as it noted, the Supreme Court of California was assured by the three county clerks who were named as defendants that the three named plaintiffs would be allowed to register and vote. The three named plaintiffs resided respectively in the California counties of San Luis Obispo, Monterey, and Stanislaus, and the county clerks of those counties who were named as defendants neither defended the action in the Supreme Court of California nor sought review here. Petitioner here is the County Clerk of Mendocino County, who though of

course bound by the judgment of the Supreme Court of California, since she was made a party to that action, has no concrete dispute with voters who reside in other counties. Thus if the case were limited to the named parties alone, it could be persuasively argued that there was no present dispute on the issue of the right to register between the three named individual respondents in this Court and the one named petitioner here.

We think, however, that the unusual procedural history of the case in the Supreme Court of California leads to the conclusion that the litigation before us is not moot. The individual named plaintiffs brought their action in the Supreme Court of California on behalf of themselves and all other ex-felons similarly situated, and not simply those ex-felons residing in the counties in which the named plaintiffs resided. While only the county clerks of Stanislaus, Monterey, and San Luis Obispo were named parties defendant, they were designated in the original complaint filed in the Supreme Court of California "as representatives of all other county clerks." The California Secretary of State was likewise named a party defendant. On the basis of this complaint, the Supreme Court of California issued an alternative writ of mandate directed to the three named county clerks "individually and as representatives of the class of all other county clerks and registrars of voters," directing them to register to vote not simply the three named plaintiffs, but "all ex-felons whose term of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote," or in the alternative to show cause why they had not done so upon the return date of the writ. Thus while the Supreme Court of California did not in so many words say that it was permitting respondents to proceed by way of a "class action," the fact that the Court's process recited that the named registrars were subject to it "individually and as

representatives of the class of all other county clerks and registrars of voters," and the fact that the beneficiaries of that process were not merely the named appellants but "all ex-felons whose term of incarceration and parole had expired . . ." indicates that the Court treated the action as one brought for the benefit of the class described in the petition for the writ of mandate.

Petitioner Viola Richardson, the county clerk in Mendocino County, filed a complaint in intervention in the action in the Supreme Court of California, alleging that the suit as framed by the named plaintiffs was collusive, in that neither the three named county clerks nor the Secretary of State could be expected to contest the claims of plaintiffs. Petitioner Viola Richardson further alleged in her complaint of intervention that she was a party to a lawsuit brought against her by an ex-felon (also named Richardson) who had sought to register in Mendocino County, had been denied the right, and whose suit seeking to establish the right was then pending in the state court of appeal.

The county clerks actually named as respondents in the mandate action each obeyed the alternative writ issued by the Supreme Court of California, and did not contest the named plaintiffs' legal claim that they had a right to vote secured by the Equal Protection Clause of the Fourteenth Amendment which overrode the contrary provisions of the California Constitution. The Secretary of State appeared in the action and generally denied the named plaintiffs' essential claims.

The Supreme Court of California, prior to the return date of the writ, issued an order denying petitioner Richardson's motion to intervene, but instead ordered her added to the named defendants in the action along with the three other named county clerks and the Secretary of State. This action in the Supreme Court of California, coming as it did after the default of the named

clerks in the counties in which the named plaintiffs resided, and yet at a time when the Secretary of State was still a party defendant who had answered the complaint, clearly indicates to us that that court considered the action to be not only on behalf of the three named plaintiffs, but also on behalf of all ex-felons in California similarly situated. We are reinforced in this conclusion by the language quoted above from the alternate writ of mandate issued by the Supreme Court of California. Had the Supreme Court of California based its action on petitioner Richardson's claim that the suit was collusive, and that it might become a binding precedent in her litigation then pending in the state court of appeal, it would seem to have been sufficient to grant the motion to intervene. But the court's action adding petitioner Richardson as a named defendant would appear to have been based on its conclusion that at least some members of the class represented by the plaintiffs in fact resided in Mendocino County, and were there seeking to exercise their right to vote. In reaching such a conclusion, of course, the Supreme Court of California had before it petitioner Richardson's allegation that at least her opponent in the litigation pending in the court of appeal was not merely seeking to register to vote in Mendocino County, but had brought a lawsuit to enforce his claim.

At the time petitioner Richardson was added as a party defendant, the three named plaintiffs had obtained the relief which they sought, whereas the remaining members of the class, including petitioner Richardson's opponent in the court of appeal litigation, had not. We have held that in the federal system one may not represent a class of which he is not a part, *Bailey* v. *Patterson*, 369 U. S. 31, 32–33 (1962), and if this action had arisen in the federal courts there would be serious doubt as to whether it could have proceeded as a class action on behalf of the class of ex-felons denied the

right to register after the three named plaintiffs had been granted that right. *Indiana Employment Security Commission* v. *Burney*, 409 U. S. 540 (1973). But California is at liberty to prescribe its own rules for class actions, subject only to whether limits may be imposed by the United States Constitution, and we interpret its action in adding petitioner Richardson as a respondent to mean that it regarded her opponent in the court of appeal litigation, both as an unnamed member of the class of ex-felons referred to in the mandate complaint, and as one of a class actually seeking to register in Mendocino County, as a party to the action in the Supreme Court of California, albeit an unnamed one.

In *Brockington* v. *Rhodes*, 396 U. S. 41 (1969), we emphasized in finding the case moot that appellant's "suit did not purport to be a class action, and he sought no declaratory relief." *Id.*, at 42. We said:

> "In view of the limited nature of the relief sought, we think this case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future election. He did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future. He did not sue for himself and other similarly situated as independent *voters*, as he might have under Ohio law. . . . He did not seek a declaratory judgment, although that avenue too was open to him. . . ." *Id.*, at 43.

Here, unlike *Brockington*, there was a class action, and relief in the nature of declaratory relief was granted. The decision below is not only binding on petitioner Richardson, and thus dispositive of her other court of appeal litigation, but also decides the federal constitutional question presented for the unnamed members of the classes represented below by petitioner and respond-

ents, whose continuing controversy led the Supreme Court of California to conclude that this case was not moot.

The briefs of the parties before us indicate that the adverse alignment in the Supreme Court of California continues in this Court, and we therefore hold the case is not moot.[13]

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[13] Our Brother MARSHALL argues in dissent that since the Supreme Court of California did not issue the peremptory writ of mandate, its opinion in this case is an advisory one which does not come within the "case of controversy" requirement of Art. III of the Constitution. He also contends that that court's refusal to issue the peremptory writ must rest on some unarticulated state ground, which he concludes should bar review of the federal constitutional question by this Court.

The Supreme Court of California has only recently noted its policy of avoiding advisory opinions on abstract questions of law, *In re William M.*, 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 Pac. 2d 737 (1970), while in the same opinion adverting to its "declaratory use of habeas corpus in a number of cases" such as *In re Gonsalves*, 48 Cal. 2d 638, 311 Pac. 2d 483 (1957). In support of its determination in the case before us that exercise of its original jurisdiction would be appropriate, the Supreme Court of California cited *Young* v. *Gnoss*, 7 Cal. 3d 18, 101 Cal. Rep. 533, 496 F. 2d 445 (1972). There it had exercised its original mandamus jurisdiction to conclude that the durational residency requirements for voting imposed by California law violated the Equal Protection Clause of the Fourteenth Amendment. Saying that its "function at this time is simply to declare the minimum that must be done to implement *Dunn* v. *Blumstein*," 7 Cal. 2d, at 27, the Court refused to issue a peremptory writ of mandate in that case, just as it did here, saying that "[s]ince there is no reason to believe that any of the parties to this proceeding will not accede to our holdings herein, no purpose would be served by issuing a writ of mandate to compel such compliance with respect to the 1972 general election . . . ." *Id.*, at 29. United States courts of appeals, which are barred by the case or controversy requirement of Art. III from issuing advisory opinions, have nonetheless declined to issue peremptory writs against district judges on the assumption that the latter would abide by the opinion of the Court of Appeals without the compulsion of such a writ. *In re*

II

Unlike most claims under the Equal Protection Clause, for the decision of which we have only the language of the clause itself as it is embodied in the Fourteenth Amendment, respondent's claim implicates not merely the language of the Equal Protection Clause of § 1 of the Fourteenth Amendment, but also the provisions of the less familiar § 2 of the amendment:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the

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United States, 257 F. 2d 844 (CA5 1958); *In re United States*, 207 F. 2d 567 (CA5 1953).

We think that the reliance of the Supreme Court of California on its earlier decision recognizing and approving the use of its original jurisdiction to grant declaratory relief, as well as its reliance on precedent in an original mandamus proceeding in which it reached the merits but declined to issue the peremptory writ where there was no question of mootness, supports our conclusion that that court's judgment in this case is for all practical purposes at least a declaratory judgment. And it is well settled that, where there is "an actual and acute controversy," an appeal from a declaratory judgment of a state court presents a "case or controversy" within this Court's jurisdiction. *National, Chattanooga, & St. Louis R. Co.* v. *Wallace*, 288 U. S. 249 (1933). Indeed, any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 U. S. C. § 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court.

We are equally unable to accept the view of the dissenters that the California court's failure here to issue the peremptory writ must rest on that court's resolution of some unspecified state law question against petitioner. The mere failure of a state court to award peremptory relief in a proceeding which it treats as one for a declaratory judgment is not an "adequate state ground" which precludes our review of its federal constitutional holding.

right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of the representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis supplied.)

Petitioners contend that the italicized language of § 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony. They go on to argue that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment. This argument seems to us a persuasive one unless it can be shown that the language of § 2, "except for participation in rebellion, or other crime," was intended to have a different meaning than would appear from its face.

The problem of interpreting the "intention" of a constitutional provision is, as countless cases of this Court recognize, a difficult one. Not only are there deliberations of congressional committees and floor debates in the House and Senate, but an amendment must thereafter be ratified by the necessary number of States. The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect

of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.

A predecessor of § 2 was contained in an earlier draft of the proposed Amendment, which passed the House of Representatives, but was defeated in the Senate early in 1866. The Joint Committee of Fifteen on Reconstruction then reconvened, and for a short period in April 1866, revised and redrafted what ultimately became the Fourteenth Amendment. The Journal of that Committee's proceedings shows only what motions were made and how the various members of the Committee voted on the motions; it does not indicate the nature or content of any of the discussion in the Committee. While the Journal thus enables us to trace the evolution of the draft language in the Committee, it throws only indirect light on the intention or purpose of those who drafted § 2. See Kendrick, Journal of the Joint Committee on Reconstruction, pp. 104–120.

We do know that the particular language of § 2 upon which petitioners rely was first proposed by Senator Williams of Oregon to a meeting of the Joint Committee on April 28, 1866. Senator Williams moved to strike out what had been § 3 of the earlier version of the draft, and to insert in place thereof the following:

> "Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than 21 years

> of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than 21 years of age."

The Joint Committee approved this proposal by a lopsided margin, and the draft Amendment was reported to the House Floor with no change in the language of § 2.

Throughout the floor debates in both the House and the Senate, in which numerous changes of language in § 2 were proposed, the language "except for participation in rebellion, or other crime" was never altered. The language of § 2 attracted a good deal of interest during the debates, but most of the discussion was devoted to its foreseeable consequences in both the Northern and Southern States, and to arguments as to its necessity or wisdom. What little comment there was on the phrase in question here supports a plain reading of it.

Congressman John Bingham of Ohio, who was one of the principal architects of the Fourteenth Amendment an influential member of the Committee of Fifteen, commented with respect to the second section as follows during the Floor debates in the House:

> "The second section of the Amendment simply provides for the equalization of representation among all the States of Union, North, South, East, and West. It makes no discrimination. New York has a colored population of fifty thousand. By this section, if that great State discriminates against her colored population as to the elective franchise, (except in cases of crimes,) she loses to that extent her representative power in Congress. So also will it be with

every other State." Cong. Globe, 39th Cong., 1st Sess., 2543 (1866).

Two other Representatives who spoke to the question made similar comments. Representative Thomas Eliot of Massachusetts commented in support of the enactment of § 2 as follows:

"Manifestly no state should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be impartial enfranchisement of all citizens not disqualified by crime." *Id.*, at 2511 (1866).

Representative Ephraim Eckley of Ohio made this observation:

"Under a congressional Act persons convicted of a crime against the laws of the United States, the penalty for which is imprisonment in the penitentiary, are now and always have been disenfranchised, and a pardon did not restore them unless the warrant of pardon so provided.

". . . But suppose the mass of the people of a state are pirates, counterfeiters, or other criminals, would gentlemen be willing to repeal the laws now in force in order to give them an opportunity to land their piratical crafts and come on shore to assist in the election of a President or members of Congress because they are numerous? And let it be borne in mind that these latter offenses are only crimes committed against property; that of treason

> is against the nation, against the whole people—the highest known to the law." *Id.*, at 2535.

The debates in the Senate did not cover the subject as exhaustively as did the debates in the House, apparently because many of the critical decisions were made by the Republican Senators in an unreported series of caucuses off the floor. Senator Saulsbury of Delaware, a Democrat who was not included in the majority caucus, observed:

> "It is very well known that the majority of the members of this body who favor a proposition of this character have been in very serious deliberation for several days in reference to these amendments, and have held some four or five caucuses on the subject." *Id.*, at 2869.

Nonetheless, the occasional comments of Senators on the language in question indicate an understanding similar to that of the House members. Senator Reverdy Johnson of Maryland, one of the principal opponents of the Fourteenth Amendment, made this argument:

> "Now it is proposed to deny the right to be represented of a part, simply because they are not permitted to exercise the right of voting. You do not put them upon the footing of aliens, upon the footing of rebels, upon the footing of minors, upon the footing of the females, upon the footing of those who may have committed crimes of the most heinous character. Murderers, robbers, house burners, counterfeiters of the public securities of the United States, all who may have committed any crime, at any time, against the laws of the United States or the laws of a particular State, are to be included within the basis; but the poor black man, unless he is

> permitted to vote is not to be represented, and is to have no interest in the Government." *Id.*, at 3029.

Senator Henderson of Missouri, speaking in favor of the version of § 2 which had been reported by the Joint Committee in April, as opposed to the earlier provision of the proposal which had been defeated in the Senate, said this:

> "The States under the former proposition [the corresponding provision of the original Amendment reported by the Committee of Fifteen, which passed the House of Representatives but was defeated in the Senate] might have excluded the negroes under an educational test and yet retain their power in Congress. Under this they cannot. For all practical purposes, under the former proposition loss of representation followed the disfranchisement of the negro only; under this it follows the disenfranchisement of white and black, unless excluded on account of 'rebellion or other crime.'" *Id.*, at 3033.

Further light is shed on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of § 2, by the fact that at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.[14]

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[14] Va. Const. Art. 3, § 1 (1776); Ky. Const. Art. 8, § 8 (1799); Ohio Const. Art. 4, § 4 (1802); La. Const. Art. 6, § 4 (1812); Ind. Const. Art. 6, § 4 (1816); Miss. Const. Art. 6, § 5 (1817); Conn. Const. Art. 6, § 2 (1818); Ill. Const. Art. 2, § 30 (1818); Ala. Const. Art. 6, § 5 (1819); Mo. Const. Art. 3, § 14 (1820); N. Y. Const. Art. 2, § 2 (1821). Del. Const. Art. 4, § 1 (1831); Tenn. Const.

More impressive than the mere existence of the state constitutional provisions disenfranchising felons at the time of the adoption of the Fourteenth Amendment is the congressional treatment of States readmitted to the Union following the Civil War. For every State thus readmitted, affirmative congressional action in the form of an enabling act was taken, and as a part of the readmission process the State seeking readmission was required to submit for the approval of the Congress its proposed state constitution. In March of 1867, before any State was readmitted, Congress passed "An act to provide for the more efficient Government of the Rebel States," the so-called Reconstruction Act. Act of March 2, 1867, c. 153, 14 Stat. 428. Section 5 of the Reconstruction Act established conditions on which the former Confederate States would be readmitted to representation in Congress. It provided:

> ". . . That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, *except such as may be disenfranchised*

Art. 4, § 2 (1834); Fla. Const. Art. 6, § 4 (1838); R. I. Const. Art. 2, § 4 (1842); N. J. Const. Art. 2, § 1 (1844); Tex. Const. Art. 7, § 4 (1845); Iowa Const. Art. 2, § 5 (1846); Wisc. Const. Art. 3, § 2 (1848); Calif. Const. Art. 2, § 5 (1849); Md. Const. Art. 1, § 5 (1851); Minn. Const. Art. 7, § 2 (1857); Ore. Const. Art. 2, § 3 (1857); Kan. Const. Art. 5, § 2 (1859); W. Va. Const. Art. 3, § 1 (1863); Nev. Const. Art. 2, § 1 (1864); S. C. Const. Art. 4, § 1 (1865); Ga. Const. Art. 2, § 6 (1866); N. C. Const. Art. 6, § 5 (1868).

> *for participation in the rebellion or for felony at common law,* and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State . . . ." (Emphasis supplied.)

Section 5 was introduced as a Senate amendment to the House bill, which was concerned only with the establishment of military government in the former confederate States. Cong. Globe, 39th Cong., 2d Sess., 1360–1361 (1867). The legislative history of the Reconstruction Act was recounted by Senator Henderson of Missouri, who ultimately voted for it:

> "As the bill originally came from the House it was a bald and naked proposition to establish without limitation of power or the time of its duration a purely military government for the ten States now

unrepresented. This in my judgment was a most dangerous experiment. . . .

"The Senate, being unwilling to embark on the experiment of pure military rule, modified the House bill by adopting what is known as the Blaine or Sherman amendment. This amendment conceded military rule, as asked by the House, but put some sort of limit to its duration. It provided that when the rebel states should adopt universal suffrage, regardless of color or race, excluding none, white or black, except for treason or such crimes as were felony at the common law, the regulation or exclusion to be left to the States themselves, and should adopt the constitutional amendment proposed at the last session of Congress . . . and so soon as a sufficient number of said States should adopt it to make it a part of their Constitution of the United States, then military law should cease and the States should be admitted provided that Congress should then see fit to receive them." *Id.*, at 1642.

A series of enabling acts in 1868 and 1870 admitted those States to representation in Congress. The Act admitting Arkansas, the first State to be so admitted, attached a condition to her admission. Act of June 22, 1868, c. 153, 15 Stat. 72. That Act provided:

"WHEREAS the people of Arkansas, in pursuance of the provisions of an act entitled 'An act for the more efficient government of the rebel States' passed March second, eighteen hundred and sixty-seven, and the act supplementary thereto, have framed and adopted a constitution of State government, which is republican, and the legislature of said State had duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth

Congress, and known as article fourteen: Therefore,

"*Be it enacted* . . . That the State of Arkansas is entitled and admitted to representation in Congress as one of the States of the Union upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or unchanged as to deprive any citizen or class of citizens of the United States of the right to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State: *Provided*, that any alteration of said constitution prospective in its effect may be made in regard to the time and place of residence of voters."

The phrase "under laws equally applicable to all the inhabitants of said State" was introduced as an amendment to the House bill by Senator Drake of Missouri. Cong. Globe, 39th Cong., 1st Sess., 2600 (1868). Senator Drake's explanation of his reason for introducing his amendment is illuminating. He expressed concern that without that restriction, Arkansas might misuse the exception for felons to disenfranchise Negroes:

"There is still another objection to the condition as expressed in the bill, and that is in the exception as to the punishment for crime. The bill authorizes men to be deprived of the right to vote 'as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted.' There is one fundamental defect in that, and that is that there is no requirement that the laws under which men shall be duly convicted of these crimes shall be equally applicable to all the inhabitants of the State. It is a very easy thing in a State to make one set of laws applicable to white

men, and another set of laws applicable to colored men." *Ibid.*

The same "fundamental condition" as was imposed by the act readmitting Arkansas was also, with only slight variations in language, imposed by the act readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, enacted three days later. Act of June 25, 1868, c. 153, 15 Stat. 73. That condition was again imposed by the acts readmitting Virginia, Mississippi, Texas, and Georgia early in 1870. Act of Jan. 2, 1870, c. 10, 16 Stat. 62; Act of Feb. 1, 1870, c. 12, 16 Stat. 63; Act of Feb. 23, 1870, c. 19, 16 Stat. 67; Act of March 30, 1870, c. 39, 16 Stat. 80.

This convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons. Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. *Murphy* v. *Ramsey*, 114 U. S. 15 (1885); *Davis* v. *Beason*, 133 U. S. 333 (1890). Much more recently we have strongly suggested in *dicta* that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter* v. *North Hampton County Board of Elections*, 360 U. S. 45 (1959), where we upheld North Carolina's imposition of a literary requirement for voting, the Court said, 360 U. S. 51:

"Residence requirements, age, and previous criminal record (*Davis* v. *Beason*, 133 U. S. 333, 345–347)

> are obvious examples indicating factors which a state may take into consideration in determining the qualification of voters."

Still more recently, we have summarily affirmed two decisions of three-judge district courts rejecting constitutional challenges to state laws disenfranchising convicted felons. *Fincher* v. *Scott*, 532 F. Supp. 117 (MDNC 1972), aff'd, 411 U. S. 961 (1973); *Beachum* v. *Braterman*, 300 F. Supp. 182 (SD Fla. 1969), aff'd, 396 U. S. 12. Both District Courts relied on *Green* v. *Board of Elections*, 380 F. 2d 445 (CA2 1967), cert. denied, 389 U. S. 1048 (1968), where the Court of Appeals for the Second Circuit held that a challenge to New York's exclusion of convicted felons from the vote did not require the convening of a three-judge district court.

Despite this settled historical and judicial understanding of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons, respondents argue that our recent decisions invalidating other state-imposed restrictions on the franchise as violative of the Equal Protection Clause require us to invalidate the disenfranchisement of felons as well. They rely on such cases as *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), *Bullock* v. *Carter*, 405 U. S. 134 (1972), *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969), and *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), to support the conclusions of the Supreme Court of California that a State must show a "compelling state interest" to justify exclusion of ex-felons from the franchise and that California has not done so here.

As we have seen, however, the exclusion of felons from the vote has an affirmative sanciton in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely.

We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. We do not think that the Court's refusal to accept Justice Harlan's position in his dissents in *Reynolds* v. *Sims*, 377 U. S. 533, 589 (1964), and *Carrington* v. *Rash*, 380 U. S. 89, 97 (1965), that § 2 is the only part of the Amendment dealing with voting rights, dictates an opposite result. We need not go nearly so far as Justice Harlan would have to reach our conclusion, for we may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement. Nor can we accept respondents' argument that because § 2 was made part of the Amendment "largely through the accident of political exigency rather than for the relation which it bore to the other sections of the Amendment," we must not look to it for guidance in interpreting § 1. It is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means.

Pressed upon us by the respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term.

We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But its not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

We therefore hold that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles. The California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 72–1589

Viola N. Richardson, as County Clerk, Etc., Petitioner, v. Abran Ramirez et al. } On Writ of Certiorari to the Supreme Court of California.

[June 24, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment. This result is, in my view, based on an unsound historical analysis which already has been rejected by this Court. In straining to reach that result, I believe that the Court has also disregarded important limitations on its jurisdiction. For these reasons, I respectfully dissent.

I

A brief retracing of the procedural history of this case is necessary to a full understanding of my views. Each of the respondents, the plaintiffs below,[1] had been convicted of a felony unrelated to voting and had fully served his term of incarceration and parole. Each applied to register to vote in his respective county—Ramirez in San Luis Obispo County, Lee in Monterey County, and Gill in Stanislaus County. All three were refused regis-

[1] The proceeding below was a petition for a writ of mandamus in the California Supreme Court, hence the moving parties should properly be described as petitioners rather than plaintiffs. However, to avoid confusion, since the petitioners below are the respondents here and vice-versa, the parties in the California Court will be referred to herein simply as plaintiffs and defendants.

tration because, under applicable provisions of the California Constitution, "no person convicted of any infamous crime shall exercise the privilege of an elector." [2]

The three named plaintiffs filed a petition for mandamus in the California Supreme Court, invoking its original jurisdiction. Plaintiffs challenged the State's disenfranchisement of ex-felons as being violative of the Equal Protection Clause of the Fourteenth Amendment and sought issuance of a peremptory writ of mandamus to compel their registration. The complaint labelled the suit as brought "individually and on behalf of all other persons who are ineligible to register to vote in California solely by reason of a conviction of a felony other than an election code felony" and who had fully served their terms of incarceration and parole. The complaint named, as defendants, the election officials who had refused to register them, "individually and as representatives of the class of all other County Clerks and Registrars who have the duty of determining for their respective counties whether any ex-felon will be denied the right to vote."

The three named election officials did not contest the action and represented to the state court that they would permit the named plaintiffs and all similarly situated ex-felons in their counties to register and to vote. The representative of the Secretary of State of California, also named as a defendant, has similarly agreed not to contest the suit.[3] At this point in the litigation all of the named

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[2] California Constitution, Art. II, § 1 provided, in part, that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this state." Article II, § 1 was repealed by referendum at the November 7, 1972, general election and was replaced by a new Art. II, § 3 containing the same prohibition. The State implementing statutes include California Election Code §§ 310, 321, 383, 389, 390, and 14240.

[3] The Attorney General has filed a separate petition for certiorari, No. 73-324, to review the judgment of the California Supreme Court.

plaintiffs had been voluntarily afforded the relief they were seeking by the election officials in their respective counties.

Subsequently, the petitioner in this Court, Viola Richardson, as County Clerk of Mendocino County, filed a motion to intervene in the proceedings before the California Supreme Court. She indicated to the court that she was being sued in a separate action in a lower state court by an ex-felon seeking to register in her county and that the decision in this case would be dispositive of the legal issue in that controversy. The State Supreme Court ordered Richardson added as a named defendant in the instant action, but did not name the ex-felon suing her as a plaintiff or named class representative herein.

In its opinion, the California Supreme Court found the case not be moot and took the opportunity to address the merits of the Fourteenth Amendment issue. It indicated that, in its view, the ex-felon disenfranchisement provision of the California Constitution and its implementing statutes violated the Equal Protection Clause. The state court did not, however, afford the plaintiffs the relief they sought. The court denied the peremptory write of mandamus.

Although the California Supreme Court did not issue a writ ordering Richardson to register either the ex-felon suing her or any other potential elector in her county, she sought review of the State court's decision by way of writ of certiorari in this Court. The election officials in the named plaintiffs' counties did not seek review and the Secretary of State filed a memorandum opposing review by this Court.

A

There are a number of reasons why I do not believe this case is properly before us at this time. First, I am

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The Secretary of State filed a memorandum opposing that petition for certiorari.

persuaded that the judgment of the California Supreme Court rests on an adequate and independent state ground.

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . . Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945).

Plaintiffs sought, from the California Supreme Court, a writ of mandamus compelling their registration. The state court denied that relief. The entirety of the judgment of that court is as follows:

> "The alternative writ having served its purpose, is discharged, and the petition for peremptory writ is denied." [4]

The accompanying opinion indicates that the California court did not consider the case before it to be moot and that, on its view, the plaintiffs' assertion that the disenfranchisement provisions were unconstitutional was well taken. Since the court nonetheless denied plaintiffs the relief they sought, we can only conclude that it did so on independent state law grounds. Cf. *Brockington* v.

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[4] The judgment of the California Supreme Court is by custom the final paragraph of its opinion. The Alternative Writ referred to is merely a show cause order, requiring the respondent to comply with the petitioner's demand or show cause why it should not be ordered to do so.

Rhodes, 396 U. S. 41, 44 (1969). For example, mandamus being a discretionary writ, the State court may have declined its issuance simply because the named plaintiffs had already been registered and mandamus relief seemed unnecessary.[5] There is certainly no indication that the decision to deny the writ was based on the State court's view on any federal question.

This Court creates an interesting anomaly by purporting to reverse the judgment of the California court. Since that court denied a writ of mandamus to compel the registration of ex-felons, the only disposition consistent with this Court's view that the California disenfranchisement provisions are constitutional would be to affirm the judgment below. By reversing, the Court apparently directs the issuance of the peremptory writ. This anomaly demonstrates that this is a classic example of a case where "the same judgment would be rendered by the state court after we corrected its views of federal laws," *Herb* v. *Pitcairn*, *supra*, hence we can but offer an advisory opinion here. Whether we agree or disagree with the State court's view of the constitutionality of the challenged provisions, the judgment of the State court will necessarily remain to deny the writ of mandamus.

The Court is aware of this problem and purports to resolve it by speculating that the California court may have afforded plaintiffs declaratory relief. Such speculation is totally unfounded. Neither the opinion nor the judgment of the court below even mentions declaratory relief. The plaintiffs did not seek a declaratory judgment. The California Constitution on its face appears to bar the State Supreme Court from issuing a declaratory judgment in an original proceeding such as the one before us, since it limits that court's original jurisdiction to

[5] See Witkin, 5 Cal. Proc. 2d, Extraordinary Writs § 22, at 3796–3697, and § 123, at 3899 (1971).

"proceedings for extraordinary relief, in the nature of mandamus, certiorari and prohibition." Calif. Constit. Art. 6, § 10. Exclusive jurisdiction for suits seeking declaratory relief is vested, by statute, in the state superior courts.[6]

This Court's basis for construing the judgment of the court below as affording declaratory relief is its argument that because the California Supreme Court is the highest court of the State, its observations on the constitutionality of the challenged disenfranchisement provisions are apt to be heeded by state officials. It is true that the opinion of the California court did indicate a view on the merits of the plaintiffs' constitutional claim. But this Court's power "is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcarin*, *supra*. One could always argue that where a state court had commented on a matter of federal law, state officials would heed those comments. To say that such comments are a "declaration of federal law" reviewable by this Court is a rationale that would reach every case in which the state court decision rests on adequate state grounds, rendering that doctrine a virtuall nullity. The Court also cites two cases for the proposition that the California Supreme Court can issue a declaratory judgment in an original proceeding. But, on closer inspection, the cases cited by the Court, *ante*, at 15–16, n. 13, merely demonstrate that California courts, whose jurisdiction is not limited by any equivalent to Art. III, are

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[6] Calif. Code Civ. Proc. § 1060; see 15 Cal. Jur. 2d, Declaratory Relief § 13; Witkin, 3 Cal. Proc. 2d, Pleading § 705 (c), at 2329 (1971); see *e. g.*, *Dills* v. *Delira Corp.*, 145 C. A. 2d 124, 129, 302 P. 2d 397, 402 (1956).

The difference between "mandamus and declaratory relief [is] that appellate courts cannot give the latter." Witkin, 5 Cal. Proc. 2d, Extraordinary Writs § 21, at 3796.

free to render advisory opinions.[7] There is little doubt that many public officials would heed such an advisory opinion from the California Supreme Court and they

[7] In the first case relied on by the majority, *In re William M.*, 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 P. 2d 737 (1970), the California Supreme Court had previously granted a writ of habeas corpus which effectively mooted the petitioner's claim for relief. The court, nonetheless, later issued an opinion on the issue posed by the case while denying further relief. In a footnote, the court observed that as a general proposition, courts should avoid advisory opinions, but, in the very next sentence, reaffirmed its inherent discretion to issue such opinions. In the accompanying text, the court noted that it could render a decision in a moot case which would not be binding on a party before it, where the case involved issues of particular public importance. Although the Court referred to its "declaratory use of habeas corpus in a number of cases," citing Witkin, Cal. Crim. Proc. § 790, and *In re Fluery*, 67 Cal. 2d 600, 63 Cal. Rptr. 298, 432 P. 2d 986 (1967), the Witkin treatise refers to the court's "declaratory use of habeas corpus" and *In re Fluery*, *supra*, in particular, as examples of the "use of the writ to render a purely advisory opinion unnecessary to the determination of the particular controversy." Witkin, Cal. Crim. Proc. (Supp. 1967), Habeas Corpus and Other Extraordinary Writs § 790, at 247.

The second case relied on by the majority is *Young* v. *Gnoss*, 7 Cal. 3d 18, 101 Cal. Rptr. 533, 496 P. 2d 445 (1972), cited by the court below solely for the proposition that mandamus is an appropriate remedy to seek in an original proceeding. In that case, the petitioners had sought mandamus relief from the application of a state durational residency requirement for voting in order that they might vote in a June primary. The California Supreme Court, in a lengthy opinion, indicated that the challenged requirement was unconstitutional on the authority of our decision in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), but exercised its equitable discretion not to order a change in the residence requirements for the June primary because too little time remained for such a change to be implemented in an orderly fashion. Accordingly, mandamus relief was denied. The Court recommended that the necessary changes in residence requirements be affected before the November election but did not so order to give the "Legislature the opportunity to address itself to the problem. . . ." The court relied on its earlier decision in *Legislature*

would also heed an advisory opinion issued by this Court, but that does not free us from the constitutional limitations on our jurisdiction.

Because I believe that the judgment of the California court was based on adequate and independent state grounds, I do not think we have jurisdiction to consider any other issues presented by this case.

B

Assuming, *arguendo*, that the California Supreme Court did grant a declaratory judgment, I still believe that we are without jurisdiction because no case or controversy is presented. The Court seems willing to concede that the claims of the named plaintiffs may well be moot. *Ante*, at 11. The Court, however, premises its jurisdiction on the assumption that there is a live controversy between the named petitioner in this Court and the unnamed plaintiff class members in her own county. To reach this conclusion, it is essential for the Court to conclude that this case is, in fact, a class action and that, in the circumstances of this case, it is appropriate to look to unnamed class members to determine whether there is a live controversy.

I am forced to point out that one of the crucial premises

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v. *Reincke*, 6 Cal. 3d 595, 99 Cal. Rptr. 481, 492 P. 2d 385 (1972), where the Court had expressed its views on a legislative reapportionment problem, denied a writ of mandamus and retained jurisdiction to allow the legislature an opportunity to act before providing any judicial relief.

Each of these cases involve examples of advisory opinions rather than declaratory relief. In the latter, what the California Supreme Court did was to provide some guidance to the legislature while staying its hand and not affording judicial relief for the claimed deprivation. It seems well settled that California courts have "inherent discretion" to issue such advisory opinions. See Witkin, 2 Cal. Proc. 2d, Actions § 44, at 920 (1971); *id.*, § 42, at 916; *id.*, 5 Cal. Proc. 2d, Extraordinary Writs § 117, at 3894; cf. *Kirstowsky* v. *Superior Court*, 143 C. A. 2d 745, 749, 300 P. 2d 163, 167 (1956).

upon which the Court bases its assumption of jurisdiction—the existence of a class action—is highly speculative. I am persuaded that the California court never treated this case as a class action. As the majority notes, the case was titled a class action by its originators and the show cause order merely tracked the language of the complaint. But the California court was, of course, not bound by that designation. In the entirety of its lengthy opinion, the California court does not once refer to this suit as a class action, to respondents as class representatives, to the existence of unnamed parties or to any other indicia of class action status. Rather, the state court describes the case as simply "a proceeding for writ of mandate brought by three ex-felons to compel respondent election officials to register them as voters." The opinion proceeds to list the three plaintiffs and, in a footnote, to explain that the only other plaintiffs were the League of Women Voters and three nonprofit organizations which support the interests of ex-felons. The opinion describes the defendants as the election officials of San Luis Obispo, Monterey, and Stanislaus Counties and the Secretary of State ". . . in his capacity as chief elections officer of California," and notes that "[u]pon application we ordered the Mendocino County Clerk [the petitioner here] joined as an additional party [defendant]." This description of the parties plainly indicates that this suit was not treated as a class action by the state court. I think it highly inappropriate that on the basis of nothing but speculation, this case be fashioned into a class action, for the first time, in this Court.

C

Even assuming that this case is a class action, I still would not agree that it is properly before us. I do not believe that we can look to beyond the named class members to find a case or controversy in the circumstances of this case. The Court seems to hold that review is not

foreclosed by the possible mootness of the named plaintiffs' claim because, but for the California Supreme Court's decision, unnamed class members would still be subject to the challenged disenfranchisement, hence the case presents, as to unnamed class members, an issue capable of repetition yet evading review. I disagree.

As the Court properly notes, a general rule of justiciability is that one may not represent a class of which he is not a part. Thus, as a general proposition, a federal court will not look to unnamed class members to establish the case or controversy requirement of Art. III.[8] But, the "evading review" doctrine of *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911), as recently applied in *Dunn* v. *Blumstein*, 405 U. S. 330, 333 n. 2 (1972), provides a limited exception to the general rule—an exception necessary to insure the judicial review is not foreclosed in cases where intervening events threaten to invariably moot the named plaintiff's claim for relief.

The necessity for looking beyond the named class members in this limited category of cases is evidenced by our decision in *Dunn* v. *Blumstein*, *supra*, in which the Court struck down a durational residence requirement for voting. The suit had been brought to compel the registration of the named plaintiff and the members of the class he represented in order that they might participate in an election scheduled for August 6, 1970. The Federal District Court did not order preliminary relief in time for the August election and, by the time the District Court decided the case, the next election was scheduled for November of 1970. By then, the named plaintiff would have met the challenged three-month requirement. The

[8] The Court has held, for example, that Art. III restricts standing to bring a class action to the actual members of the class. *O'Shea* v. *Littleton*, — U. S. — (1974). The named plaintiffs here had been disenfranchised at the time they filed suit, and there is thus no question concerning their standing to challenge the California disenfranchisement provisions.

District Court, nonetheless, rejected the State's argument that the controversy over the validity of the three-month requirement was therefore moot.

By the time the appeal reached this Court, the only named plaintiff had also satisfied the one-year state residence requirement. We nonetheless reached the merits, observing that "[a]lthough appellee [the only named plaintiff] can now vote, the problem to voters posed by the Tennessee residence requirement is 'capable of repetition, yet evading review.' *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969)." 405 U. S., at 333, n. 2. Both this Court and the District Court found that, although the named plaintiff had satisfied the challenged residence requirements and would no longer be disenfranchised thereby, the case was not moot. The challenged requirement remained applicable to unnamed class members,[9] and the issue presented was likely to evade review. Obviously the mere passage of a few months would invariably have rendered a challenge to the residency requirements by individual named plaintiffs moot—threatening to virtually foreclose judicial review.

A similar situation was presented in *Roe* v. *Wade*, 410 U. S. 113 (1973), relied on by the California court. We there held that although a woman who was not pregnant at the time the suit was filed did not have standing to challenge the constitutionality of the Texas abortion laws, a continuing controversy over the constitutionality

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[9] The Court distinguished its decision in *Hall* v. *Beals*, 396 U. S. 45 (1969), finding a challenge to Colorado's durational residence requirement moot, on the grounds that, in *Hall*, there had been an intervening change in law reducing the residence requirements from six months to two while the case was on appeal. Accordingly, application of the six-month requirement was incapable of repetition as to the named plaintiff or any other member of his class, and, having never been disenfranchised thereby, the named plaintiff had no standing to challenge the two-month requirement.

of those laws existed as to a named plaintiff who was pregnant when the suit was filed, even though she may not have been pregnant at later stages of the appeal. We concluded that this case provided a classic example of an issue capable of repetition, yet evading review, hence the termination of the plaintiff's pregnancy while the case was on appeal did not render the case moot—even though a woman whose pregnancy has ended is no more affected by the abortion laws than one who was not pregnant at the time the suit was filed. "[T]he . . . human gestation period is so short that . . . pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, . . . appellate review will be effectively denied." *Id.*, at 125.

There are two common threads running through these cases—in each the challenged statute would continue to be applied but the named plaintiff's claim would inevitably mature into mootness pending resolution of the lawsuit. In *Roe*, the termination of pregnancy, in *Dunn*, the passage of the residency requirement period, and in other voting cases, the occurrence of an election,[10] deprived

[10] The Court has found a live controversy in other voting cases in which intervening circumstances seemed to have mooted the named plaintiff's claim for relief. *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), for example, was an appeal from a decision denying relief to appellants who had unsuccessfully sought to be certified, as required by state law, as independent candidates for Presidential elector on the 1968 ballot. Appellants asserted that the Illinois certification requirement violated the State's constitutional obligation not to discriminate against voters in less populous counties. By the time their appeal reached this Court, the 1968 election had already taken place, but we held the case was not moot because "while the 1968 election is over, [the challenged burden] remains and controls future elections . . ." *id.*, at 816; see *Hall* v. *Beals*, 396 U. S. 45, 49 (1969), and the short span of time between the denial of certification for candidacy and actual balloting threaten to moot all future

the named plaintiff of a continuing controversy over the application of the challenged statute. In each instance, the mere passage of time threatened to insulate a constitutional deprivation from judicial review, and it is that danger which served as the raison d'etre for rejecting suggestions of mootness. Where an invalid statute would thus continue to be applied simply because judicial review of a live controversy involving the named plaintiff was invariably foreclosed—the issue would be capable of repetition yet evading review.

Accordingly, the *Southern Pacific* doctrine requires the satisfaction of two tests in order to provide an answer to a suggestion of mootness. First, the claimed deprivation must, in fact, be "capable of repetition." This element is satisfied where, even though the named plaintiff's immediate controversy has been mooted by intervening events, either be or unnamed class members may continue to suffer the alleged constitutional deprivation in the future. The case before us clearly satisfies this first element of the *Southern Pacific* doctrine test. Since the California court declined to order any county registrar to register ex-felons, presumably the challenged disenfranchisement provisions could continue to be applied to unnamed class members in counties other than those in which the named plaintiffs reside.[11]

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attacks on the questioned candidacy requirements. 394 U. S., at 816. See also, *Storer* v. *Brown*, — U. S. —, —, n. 8 (1974); *Rosario* v. *Rockefeller*, 410 U. S. 752, 756, n. 5 (1973).

[11] The extent of continuing disenfranchisement is apt to be minimal. A survey conducted by the Secretary of State of California indicated that the election officials of 52 of the 58 counties in California, representing counties which contain 97.39% of the registered voters in the State, agreed with the registrars in the named plaintiffs' counties that ex-felons should not be barred from voting in their counties. Brief for respondent, at 30.

Second, the issue presented must be likely to evade review, but for invocation of the *Southern Pacific* doctrine. It is on the "evading review" element that the Court's analysis fails. Because the claim raised in this case concerns not a time-related but rather a status-based deprivation, there is no issue evading review and no reason to look beyond the named plaintiffs.[12] This is not a situation where, by the time a case reaches this Court, it will always be too late to grant the named

[12] The Court's opinion cites our decision in *Indiana Employment Security Div.* v. *Burney*, 409 U. S. 540 (1973), for the proposition that unnamed class members may not be looked to in cases arising from the federal system, but the case does not support that proposition. *Burney* concerned a constitutional challenge to the termination of unemployment insurance benefits without a prior hearing. The only named class representative received a post-termination hearing at which she obtained a reversal of the initial determination of ineligiblity and full retroactive benefits. The Court remanded for consideration of mootness. The jurisdictional issue in this Court revolved around whether the case presented issues "capable of repetition, yet evading review." The Court did not have to find the alleged constitutional deprivation incapable of repetition, hence was not concerned with the problem of whether a future application to the named class representative was required. Rather, it appeared that the prior hearing issue was not one which would evade review. But see *id.*, at 542–546 (dissenting opinion). The Court reasoned that a post-termination hearing, afforded as a matter of course, would not invariably moot all claims for relief from members of the class. If the post-termination hearing did not result in an award of retroactive payments, as it had in the named plaintiff's case, a live and continuing controversy would be presented as to the insured's claim to the benefits allegedly wrongfully withheld pending the hearing. A case had already come to this Court in just such a posture, and the Court had summarily affirmed the judgment of the three-judge court. *Torres* v. *Department of Labor*, 405 U. S. 949 (1972), but see *id.*, 410 U. S. 971 (1973) (dissenting opinion). It was a failure to satisfy the "evading review" element of the test that led the Court to remand *Burney* for consideration of mootness.

plaintiff relief. If and when an ex-felon is refused access to the voting rolls because of his past criminal record, an intervening election will not moot his claim for relief and the status giving rise to his disenfranchisement will not inevitably terminate pending review.

There are clearly ways in which a challenge to the California disenfranchisement provisions could reach this Court. The California Supreme Court has not issued a writ of mandamus compelling the registration of any ex-felon.[13] If such a potential voter is, in fact, refused registration, a controversy suitable for resolution by this Court will be presented. The suit brought against petitioner Richardson, by an ex-felon resident of her own county, raising the same issues as those presented by this case, is presently pending in a California intermediate appellate court.[14] In that case, petitioner Richardson did, in fact, deny the plaintiff registration because he was an ex-felon. Once that case completes its passage through the state courts, it could well serve as a vehicle for our review of the California disenfranchisement provisions. That is, of course, but one example of how the issue presented here could properly reach this Court. This case does not therefore benefit from the *Southern Pacific* doctrine's authority to look to unnamed class members to establish a case or controversy.

That the California Supreme Court appears to have found the plaintiffs' claims not to be moot does not detract from this conclusion since "[e]ven in case arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes juris-

[13] In the absence of such an order, petitioner Richardson is under no compulsion to register ex-felons in her county nor subject to any penalty for failing to do so. See Cal. Code Civ. Proc. § 1097.

[14] The suit against Richardson, *Richardson* v. *James & Richardson*, 1 Civ. 32283, is presently pending in Division 3 of the Court of Appeals for the First Appellate District of California.

diction." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). Thus, unlike the Court, I am persuaded that we can look only to the named plaintiffs to satisfy the case or controversy requirement of Art. III.

D

The named plaintiffs here were registered only because the registrars in their counties had voluntarily abandoned an allegedly illegal practice of disenfranchising ex-felons, and we have said that "[m]ere voluntary cessation of illegal conduct does not moot a case; if it did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways. . . .' [But a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199 (1968); accord *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). Accordingly, whether the named plaintiffs have a live controversy with the registrars in their own counties would depend on the likelihood of future disenfranchisement.[13] But we need not consider that question here because none of the election officials in the named plaintiffs' counties sought review in this Court and none is now before us.

The sole petitioner before this Court is Viola Richardson. None of the named plaintiffs are residents of her county. While those named plaintiffs may or may not have a live controversy with the registrars in their own counties, they surely do not have one with petitioner Richardson. Whlie Richardson may well have a live controversy with ex-felons in her own county over the validity of the disenfranchisement laws, those ex-felons

[13] If claims of the named plaintiffs are moot, the proper disposition of this case would seem to be to vacate the judgment of the California Supreme Court and remand for such proceedings as that court deems appropriate. *Brockington* v. *Rhodes*, 396 U. S. 41, 44 (1969).

are not before this Court, and she has no dispute with the named plaintiffs. In sum, there is no controversy between the parties before this Court. Petitioner Richardson seeks to use the named plaintiffs controversy with their own county registrars as a vehicle for this Court to issue an advisory opinion on the issue presented by the suit brought against her by an ex-felon in her own county. Such a decision would violate the "oldest and most consistent thread in the federal law of justiciability . . . that the federal courts will not give advisory opinions." *Flast* v. *Cohen*, 392 U. S. 83, 96 (1968).

II

Since the Court nevertheless reaches the merits of the constitutionality of California's disenfranchisement of ex-felons, I find it necessary to register my dissent on the merits as well. The Court construes § 2 of the Fourteenth Amendment as an express authorization for the States to disenfranchise former felons. Section 2 does except disenfranchisement for "participation in rebellion, or other crime" from the operation of its penalty provision. As the Court notes, however, there is little independent legislative history to the crucial words "or other crime"; the proposed § 2 went to a joint committee containing only the phrase "participation in rebellion" and emerged with "or other crime" inexplicably tacked on.[16] In its exhaustive review of the lengthy legislative history of the Fourteenth Amendment, the Court has come upon only one explanatory reference for the "other crimes" provision—a reference which is unilluminating at best.[17]

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[16] See, *e. g.*, Note, Restoring the Ex-offender's Right to Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 746–747, n. 158 (1973).

[17] Statement of Representative Eckley, quoted, *ante*, at 20–21.

The historical purpose for § 2 itself is, however, relatively clear and, in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance.[18] There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis,[19] or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised, but an explicit grants of suffrage to Negroes was thought politically unpalatable at the time.[20] Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation.[21]

The political motivation behind § 2 was a limited one. It had little to do with the purposes of rest of the Fourteenth Amendment. As one noted commentator explained:

> "It became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment. . . .[22] [I]t

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[18] Bonfield, The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment, 46 Corn. L. Q. 108, 109 (1960); Flack, The Adoption of the Fourteenth Amendment 98, 126 (1908); Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 290–291; James, The Framing of the Fourteenth Amendment 185 (1956); Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-ninth Congress, 1965 Sup. Ct. Rev. 33, 44 (1965).

[19] James, n. 18, *supra*, at 138–139.

[20] Kendrick, n. 18, *supra*, at 291; cf. Flack, n. 17, *supra*, at 111, 118.

[21] Bonfield, n. 18, *supra*, at 111; James, n. 18, *supra*, at 185, Van Alstyne, n. 18, *supra*, at 43–44, 58, 65.

[22] Van Alstyne, n. 18, *supra*, at 43–44.

seems quite impossible to conclude that there was a clear and deliberate understanding in the House that § 2 was the sole source of national authority to protect voting rights, or that it expressly recognized the states' power to deny or abridge the right to vote." [23]

It is clear that § 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination. This Court has repeatedly rejected that rationale. See, *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Carrington* v. *Rash*, 380 U. S. 89 (1965).

Rather, a discrimination to which the penalty provision of § 2 is inapplicable must still be judged against the Equal Protection Clause of § 1 to determine whether judicial or congressional remedies should be invoked. That conclusion is compelled by this Court's holding in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970). Although § 2 excepts from its terms denial of the franchise not only to ex-felons but also to persons under 21 years of age, we held that the Congress, under § 5, had the power to implement the Equal Protection Clause by lowering the voting age to 18 in federal elections. As MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, as well as myself, there observed, § 2 was intended as no more "than a remedy supplementary, and in some conceivable circumstances indispensable, to other congressional and judicial remedies available under §§ 1 and 5." *Id.*, at 278.

The Court's references to congressional enactments contemporaneous to the adoption of the Fourteenth Amendment, such as the Reconstruction Act and the re-

[23] *Id.*, at 65.

admission statutes, are inapposite. They do not explain the purpose for the adoption of § 2 of the Fourteenth Amendment. They merely indicate that disenfranchisement for participation in crime was not uncommon in the States at the time of the adoption of the Amendment. Hence, not surprisingly, that form of disenfranchisement was excepted from the application of the special penalty provision of § 2. But because Congress chose to exempt one form of electoral discrimination from the reduction of representation remedy provided by § 2 does not necessarily imply congressional approval of this disenfranchisement.[24] By providing a special remedy for disenfranchisement of a particular class of voters in § 2, Congress did not approve all election discriminations to which the § 2 remedy was inapplicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 638–639 (1969). There is no basis for concluding that Congress intended by § 2 to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment. In fact, one form of disenfranchisement—one year durational residency require-

[24] To say that § 2 of the Fourteenth Amendment is a direct limitation on the protection afforded voting rights by § 1 leads to absurd results. If one accepts the premise that § 2 authorizes disenfranchisement for any crime, the challenged California provision could, as the California Supreme Court has observed, require disenfranchisement for seduction under promise of marriage, or conspiracy to operate a motor vehicle without a muffler. *Otsuka* v. *Hite*, 64 Cal. 2d 596, 414 P. 2d 412, 51 Cal. Rptr. 284 (1966). Disenfranchisement extends to convictions for vagrancy in Alabama or breaking a water pipe in North Dakota, to note but two examples. Note, Disenfranchisement of Ex-Felons: A Reassessment, 25 Stan. L. Rev. 845, 846–847 (1973). Even a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since § 2 does not differentiate between felonies and misdemeanors.

ments—specifically authorized by the Reconstruction Act, one of the contemporaneous enactments upon which the Court relies to show the intendment of the framers of the Fourteenth Amendment, has already been declared unconstitutional by this Court in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972).

Disenfranchisement for participation in crime, like durational residency requirements, were common at the time of the adoption of the Fourteenth Amendment. But "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber." *Dillenburg* v. *Kramer*, 469 F. 2d 1222, 1226 (CA9 1972). We have repeatedly observed that:

> "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 669 (1966).

Accordingly, neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of § 2, can serve to insulate such disenfranchisement from equal protection scrutiny.

III

In my view, the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of Section I of the Fourteenth Amendment. That analysis properly begins with the observation that because the right to vote "is of the essence of a democratic society, and any restrictions on that right

strike at the heart of representative government," *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964), voting is a "fundamental" right. As we observed in *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972):

> "There is no need to repeat now the labors undertaken in earlier cases to analyze [the] right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision, after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, *e. g.*, *Evans* v. *Cornman*, 398 U. S. 419, 421–422, 426 (1970); *Kramer* v. *Union Free School District*, 395 U. S. 621, 626–628 (1969); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 667 (1966); *Carrington* v. *Rash*, 380 U. S. 89, 93–94 (1965); *Reynolds* v. *Sims*, *supra*."

We concluded, "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* State interest.' " *Id.*, at 337. (Emphasis original).

To determine that the compelling state interest test applies to the challenged classification is, however, to settle only a threshold question. "Compelling state interest" is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights. Our other equal protection cases give content to the nature of that balance. The State has the heavy burden of showing first, that the challenged disenfranchisement is necessary to a legitimate and substantial state interest; second, that the classifica-

tion is drawn with precision—that it does not exclude too many people who should not and need not be excluded; and third, that there are no other reasonable ways to achieve the State's goal with a lesser burden on the constitutionally protected interest. *E. g., Dunn* v. *Blumstein*, 405 U. S. 330, 343, 360 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621, 632 (1969); see *Rosario* v. *Rockefeller*, 410 U. S. 752, 770 (1973) (POWELL, J., dissenting); cf. *Memorial Hospital* v. *Maricopa County*, — U. S. — (1974); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

I think it clear that the State has not met its burden of justifying the blanket disenfranchisement of former felons presented by this case. There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government. See *Kramer*, *supra*, at 627. As the Secretary of State of California observed in his memorandum to the Court in support of respondents in this case:

> "It is doubtful . . . whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law abiding and productive citizens." [25]

[25] Memorandum of the Secretary of State of California in opposition to certiorari, *Ramirez* v. *Richardson*, No. 73-324.

It is argued that disenfranchisement is necessary to prevent vote frauds. Although the State has a legitimate and, in fact, compelling interest in preventing electoral fraud, the challenged provision is not sustainable on that ground. First, the disenfranchisement provisions are patently both over- and under-inclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population. See *Dillenberg* v. *Kramer,* 469 F. 2d 1222, 1125 (CA9 1972). In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters. See *Kramer, supra,* at 632; *Cipriano* v. *City of Houma,* 395 U. S. 701, 706 (1969).

Moreover, there are means available for the State to prevent voting fraud which are far less burdensome on the constitutionally protected right to vote. As we said in *Dunn, supra,* at 353, the State "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." Cf. *Harman* v. *Forssenius,* 380 U. S. 528, 543 (1965); *Schneider* v. *State,* 308 U. S. 147, 164 (1939). The California court's catalogue of that State's penal sanctions for election fraud surely demonstrates there are adequate alternatives to disenfranchisement.

> "Today . . . the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts

> are declared to be felony-misdemeanors. Among this plethora of offenses we take particular note, in the present connection, of the felony sanctions against fraudulent registrations (§ 220), buying and selling of votes (§§ 12000–12008), intimidating voters by threat or bribery (§§ 29130–29135), voting twice, or fraudulently voting without being entitled to do so, or impersonating another voter (§§ 14403, 29430–29431), fraud or forgery in casting absentee ballots (§§ 14690–14692), tampering with voting machines (§§ 15280), or ballot boxes (§§ 17090–17092), forging or altering election returns (§§ 29100–29103), and so interferring 'with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted' (§ 17093)." *Ramirez* v. *Brown*, 9 Cal. 3d 199, 215–216 (1973) (footnotes omitted).

Given the panoply of criminal offenses available to deter and to punish electoral misconduct, as well as the statutory reforms and technological changes which have transformed the electoral process in the last century, election fraud may no longer be a serious danger.[26]

Another asserted purpose is to keep former felons from voting because their likely voting pattern might be subversive of the interests of an orderly society. See *Green* v. *Board of Elections*, 380 F. 2d 445, 451 (CA2 1967). Support for the argument that electors can be kept from the ballot box for fear they might vote to repeal or emasculate provisions of the criminal code, is drawn primarily from this Court's decisions in *Murphy* v. *Ramsey*, 114 U. S. 15 (1885), and *Davis* v. *Beason*, 133 U. S. 333

[26] *Ramirez* v *Brown*, — Cal. Rptr. —, —, — P. 2d —, — 9 Cal. 3d 199, 215–216 (1973).

(1890). In *Murphy*, the Court upheld the disenfranchisement of anyone who had ever entered into a bigamous or polygamous marriage and in *Davis*, the Court sanctioned, as a condition to the exercise of franchise, the requirement of an oath that the elector did not "teach, advise counsel or encourage any person to commit the crime of bigamy or polygamy." The Court's intent was clear—"to withdraw all political influence from those who are practically hostile to" the goals of certain criminal laws. *Murphy, supra*, at 45; *Davis, supra*, at 348.

To the extent *Murphy* and *Davis* approve the doctrine that citizens can be barred from the ballot box because they would vote to change the existing criminal law, those decisions are surely of minimal continuing precedential value. We have since explicitly held that such "differences of opinion may not be a basis for excluding any group or person from the franchise," *Cipriano* v. *City of Houma*, 395 U. S. 701, 705–706 (1969); see *Communist Party of Indiana* v. *Whitcomb*, — U. S. — (1973); *Evans* v. *Cornman*, 380 U. S. 419, 423 (1970).

> "[I]f they are . . . residents, . . . they, as all other qualified residents, have a right to an equal opportunity for political representation . . . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington* v. *Rash*, 380 U. S. 89, 94 (1965); see *Dunn, supra*, 405 U. S., at 355.

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a

changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing reexamination. This Court's holding in *Davis, supra,* and *Murphy, supra,* that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal "to prevent persons from being enabled by their votes to defeat the criminal laws of the country." *Davis, supra,* 133 U. S., at 348. Today, presumably those who support the legalization of marihuana could be barred from the ballot box for much the same reason. The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. Rather than resurrect *Davis* and *Murphy,* I would expressly disavow any continued adherence to the dangerous notions therein expressed.[27]

The public purposes asserted to be served by disenfranchisement have been found wanting in many quarters.

[27] The Court also notes that the disenfranchisement of ex-felons has received support in the dicta of this Court and that we have only recently affirmed without opinion the decisions of two three-judge district courts upholding disenfranchisement provisions. *Fincher* v. *Scott,* 352 F. Supp. 117 (MDNC 1972), aff'd mem., 411 U. S. 961 (1973); *Beacham* v. *Brateman,* 300 F. Supp. 182 (SD Fla.), aff'd mem., 396 U. S. 12 (1969). But, dicta is not precedent and as MR. JUSTICE REHNQUIST has only recently reminded us, summary affirmances are obviously not of the same precedential value as would be an opinion of this Court treating the question on the merits. *Edelman* v. *Jordan,* — U. S. —, — (1974). See Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 14 (1930).

When this suit was filed, 23 States allowed ex-felons full access to the ballot. Since that time, four more States have joined their ranks.[28] Shortly after lower federal

[28] The following States do not disenfranchise all former felons: Arkansas, Ark. Stat. Ann. § 3–707 (Supp. 1971); Colorado, Colo. Const., Art. VII, § 10, and Colo. Rev. Stat. Ann. § 49–3–2 (Perm. Cum. Supp. 1971); Florida, Fla. Stat. Ann. § 940.05 (1973); Hawaii, Hawaii Rev. Stat. § 716–5 (Supp. 1971); Illinois, Ill. Ann. Stat., c. 46, § 3–5 (Smith-Hurd 1973); Indiana, Ind. Ann. Stat. § 29–4804 (1969); Kansas, Kan. Stat. Ann. § 22–3722 (Supp. 1972); Maine, Me. Rev. Stat. Ann., Tit. 21, § 245 (1972) (except election code offenders); Massachusetts, Mass. Ann. Laws, c. 51, § 1 (Supp. 1973) (except election code offenders); Michigan, Mich. Comp. Laws Ann. § 168.10 (1970); Minnesota, Minn. Stat. § 609.165 (1969); Nebraska, Neb. Rev. Stat. §§ 29–2264 and 83–1118 (Cum. Supp. 1972); New Hampshire, N. H. Rev. Stat. Ann. § 607–A (Supp. 1972); New Jersey, N. J. Rev. Stat. Ann. § 19:4–1 (Supp. 1972–1973); Ohio Rev. Code § 2967.16 (Supp. 1972); Oregon, Ore. Rev. Stat. §§ 137.240 and 137.250 (1969 Replacement); Pennsylvania, Pa. Const., Art. VII, § 7, Pa. Stat. Ann., Tit. 19, § 893, and Tit. 25, § 3552 (1964) (except election code offenders); South Dakota, S. D. Compiled Laws Ann. §§ 24–5–2 and 23–57–7 (1967); Utah Const., Art. IV, § 6 (except those convicted of treason or election code offenses); Vermont, Vt. Const., c. II, § 51 (except election code offenders); Washington, Wash. Rev. Code Ann. § 9.96.050 (Supp. 1972); West Virginia, 51 Op. W. Va. Att. Gen. 182 (1965) (construing W. Va. Const., Art. IV, § 1); Wisconsin, Wis. Stat. Ann. § 57–078 (Supp. 1972–1973); Wyoming, Wyo. Stat. Ann. § 7–311 (1957).

In 1972 Montana amended its constitution to disenfranchise potential electors only while "serving a sentence for a felony." Mont. Const., Art. IV, § 2; Mont. Rev. Code Ann. § 23–2701 (Supp. 1973). In 1973, New York amended its laws to allow former felons whose sentence had expired or who were released from parole to vote. N. Y. Election Law § 152 (McKinney Supp. 1972–1973). Also in 1973, North Carolina amended its laws to restore all civil rights including the franchise to former felons discharged from prison or parole. N. C. Gen. Stat. § 13–1 (1973). And, in the same year, the Tennessee legislature amended its ex-felon disenfranchisement statutes. See Tenn. Code Ann. § 2–205 (1973).

The New York ex-felon disenfranchisement provision was upheld

courts sustained New York's and Florida's disenfranchisement provisions, the legislatures repealed those laws. Congress has recently provided for the restoration of felons' voting rights at the end of sentence or parole in the District of Columbia. 21 D. C. Code § 1–1102 (7). The National Conference on Uniform State Laws,[29] the American Law Institute,[30] the National Probation and Parole Association,[31] the National Advisory Commission on Criminal Justice Standards and Goals,[32] the President's Commission on Law Enforcement and the Administration of Justice,[33] the California League of Women

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in *Green* v. *Board of Elections*, 380 F. 2d 445 (CA2 1967), and shortly thereafter the New York legislature repealed that law. N. Y. Election Law § 152 (McKinney Supp. 1972–1973). Similarly the Florida disenfranchisement provisions were upheld in *Beacham* v. *Braterman*, 300 F. Supp. 1048 (SD Fla.), aff'd mem., 396 U. S. 12 (1969). Subsequently, Florida statutes were amended to provide for the automatic restoration of all civil rights, including the franchise upon the completion of sentence or release from parole or probation. Fla. Stat. Ann. § 940.05 (1973).

[29] National Conference on Uniform State Laws, Uniform Act on the Status of Convicted Persons, § 2–3 (1965).

[30] American Law Institute, Model Penal Code § 306.3.

[31] National Probation and Parole Association, Standard Probation and Parole Act, §§ 12 and 27 (1955).

[32] National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, Standard 16.17 (1973). The Report observed that:

"Loss of citizenship—[including] the right to vote . . . —inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials serve no legitimate public interest." *Id.*, at 593.

[33] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections, 90 (1967):

"There seems no justification for permanently depriving all convicted felons of the vote . . . . [T]o be deprived of the right to representation in a democratic society is an important symbol.

Voters,[34] the National Democratic Party,[35] and the Secretary of State of California[36] have all strongly endorsed full suffrage rights for former felons.

The disenfranchisement of ex-felons had "its origins in the fogs and fictions of federal jurisprudence and doubtlessly has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government." *Byers* v. *Sun Savings Bank*, 41 Okla. 728, 731, 139 P. 948, 949 (1914). I think it clear that measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand.

I respectfully dissent.

MR. JUSTICE DOUGLAS, agreeing with Part I A of this opinion, dissents from a reversal of the judgment below as he cannot say that it does not rest on an independent state ground. See *Hayakawa* v. *Brown*, — U. S. — (DOUGLAS, J., writing as Circuit Justice).

Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote."

[34] California League of Women's Voters, Policy Statement, February 16, 1972.

[35] National Democratic Party, Party Platform 1972.

[36] Memorandum of the Secretary of State of California in Opposition to certiorari in *Richardson* v. *Ramirez*, No. 73-324.